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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1995

TIC UNITED CORP.,

Petitioner,

vs.

RYAN M. PATTON, and
KATHY PATTON STRUNK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Hildy Bowbeer
Counsel of Record
BOWMAN AND BROOKE
150 South Fifth Street
Minneapolis, Minnesota 55402
(612) 339-8682

Counsel for Petitioner

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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QUESTION PRESENTED

Where the applicable state law had not previously recognized a duty to provide a post-sale warning to consumers about a risk which the defendant learned about after the manufacture and sale of the product at issue, did the imposition of punitive damages upon the defendant for an alleged breach of that duty violate the notice component of the Due Process Clauses of the United States Constitution?

LIST OF PARTIES AND RELATED CORPORATIONS

The parties to the action in the United States Court of Appeals for the Tenth Circuit were the plaintiffs, Ryan Patton and Kathy Patton Strunk, and defendant TIC United Corp. *Amici Curiae* in the Tenth Circuit (on plaintiff's cross-appeal, which is not the subject of this Petition) were the Implant Device Education Association, the Wichita Area Support Group for the Survivors of Silicone Breast Implants, the Kansas Trial Lawyers Association, the Colorado Trial Lawyers Association, the Defense Research Institute, Inc. and the Product Liability Advisory Council, Inc.

TIC United Corp. identifies as its subsidiary corporations Dunamis Insurance Company Ltd., Sunbelt Sand & Gravel Co., TIC Credit Corporation and White Farm Industries, Inc. Subsidiaries of White Farm Industries, Inc. are White Farm International Corporation and White Farm U.S.A., Inc. White Farm Equipment Company is a subsidiary of White Farm U.S.A., Inc. All subsidiaries of TIC United Corp. are wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND RELATED CORPORATIONS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 5

I. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW 6

II. TIC WAS SUBJECTED TO PUNITIVE DAMAGES WITHOUT DUE PROCESS OF LAW 10

A. Kansas Did Not Recognize a Post-Sale Duty to Warn Until the Kansas Supreme Court Answered Certified Questions in This Case 10

B. The Court of Appeals Erroneously Relied Upon Inapplicable Precedent to Find that TIC Had Notice of Potential Liability 12

C. The Court of Appeals Erroneously Determined that Prior Kansas Law Imposed a Post-Sale Duty to Warn Upon TIC 14

III. THE QUESTION PRESENTED IS A CONSTITUTIONAL ISSUE IN NEED OF FURTHER DEVELOPMENT BY THIS COURT ... 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Adams-Arapahoe School Dist. No. 28-J v. GAF Corp., 959 F.2d 868 (10th Cir. 1992) 12

Anaconda Minerals Co. v. Stoller Chem. Co., 990 F.2d 1175 (10th Cir. 1993) 11

Armijo v. Ex Cam, Inc., 843 F.2d 406 (10th Cir. 1988) 12

Baggett v. Bullitt, 377 U.S. 360 (1964) 7

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) 19

Browning-Ferris Ind. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 6, 7

Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456 (1986) 13

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 3

Fields v. Farmers Ins. Co., 18 F.3d 831 (10th Cir. 1994) 12

Folks v. Kansas Power & Light Co., 243 Kan. 57, 755 P.2d 1319 (1988) 8

Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980) 15

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 7, 19, 20

Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, 114 S. Ct. 2331 (1994) 20

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 8

Landgraf v. USI Film Products, ___ U.S. ___, 114 S. Ct. 1483 (1994) 8, 20

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 7

Murphy v. City of Topeka--Shawnee County Dept. of Labor Services, 6 Kan. App. 2d 488, 630 P.2d 186 (1981) 13

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) ..passim

Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (1993) ..... passim

Romero v. International Harvester Co., 979 F.2d 1444 (10th Cir. 1992) 17

Smith v. United Technologies, Essex Group, Inc., 240 Kan. 562, 731 P.2d 871 (1987) 13

Southwest Forest Ind., Inc. v. Sutton, 868 F.2d 352 (1989) 12, 13, 14

State ex rel. Stephan v. GAF Corp., 242 Kan. 152, 747 P.2d 1326 (1987) 10

Stratton v. Garvey Int'l Inc., 9 Kan. App. 2d 254, 676 P.2d 1290 (1984) ..... passim

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711 (1993) 9, 18, 20

Vaughn v. Murray, 214 Kan. 456, 521 P.2d 262 (1974) 13

Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038, cert. denied, 469 U.S. 965 (1984) 10

Other Authorities

Restatement (Second) of Torts, §402A, *comment g* 17

Restatement (Third) of Torts: Products Liability, §2, *comment a* (Tentative Draft No. 2, March 13, 1995) 17

Constitutional Provisions

Amendment XIV, sec. 1 2

Fifth Amendment to the United States Constitution 2

Statutes and Rules

28 U.S.C. sec. 1254(1) 2

Kan. Stat. Ann. sec. 60-3702(c) 8

Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TIC UNITED CORP., *Petitioner,*

v.

RYAN M. PATTON, and
KATHY PATTON STRUNK, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TIC United Corp. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., infra, A-1–A-21) is reported at 77 F.3d 1235 (10th Cir. 1996). The opinion of the district court is reported at 859 F. Supp. 509 (D. Kan. 1994) (App., infra, A-22–A-36). Also relevant is the opinion of the Kansas Supreme Court in Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (1993) (App., infra, A-37–A-73).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 16, 1996. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTES INVOLVED

This case involves no statutes. The Due Process Clause of the Fifth Amendment to the United States Constitution provides "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." See also Amendment XIV, sec. 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law.")

STATEMENT

On April 21, 1990, plaintiff Ryan Patton was seriously injured in a farm accident. He had replaced a hydraulic cylinder on a Wil-Rich cultivator and was standing under the wing of that machine, pulling the lock pin that held the wing in place, when the wing fell on him.[1] Ryan Patton was paralyzed from the waist down in the accident.

Plaintiffs subsequently brought a product liability action against several corporate entities. In addition to established theories of defective design and inadequate warnings, plaintiffs

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[1] The cultivator was constructed of three sections, a central mainframe and a wing on either side. Tr. 793. The wings folded up to a ninety-degree angle for storage and transport. Each wing was raised and lowered by hydraulic pressure supplied by a cylinder. When raised, the wings could also be secured in position by a lock pin, which was inserted and removed manually.

also alleged that the defendants had breached a "post-sale duty to warn." In support of this allegation, plaintiffs claimed the manufacturer, as well as other corporate entities which had subsequently purchased some of the manufacturer's assets and/or assumed its obligations and liabilities, learned after the cultivator was sold that it posed a risk of harm and that these entities were under an obligation to identify, locate, and warn previous purchasers of that risk.

The defendants moved for partial summary judgment on the ground that Kansas law did not recognize a post-sale duty to warn.[2] The district court acknowledged that the Kansas courts had never passed on the issue, and therefore certified to the Kansas Supreme Court questions about the existence of a post-sale duty to warn under Kansas law. The Kansas Supreme Court examined prior duty to warn cases and agreed that although Kansas had recognized a duty on the part of successor corporations to warn of product defects which should have been, but were not, addressed by the original manufacturer at the time of sale, the Kansas courts had never addressed the issue of whether there existed a duty to provide post-sale warnings of risks that were not foreseeable at the time of sale. After examining case law from other jurisdictions, the court announced for the first time a "post-sale duty to warn ultimate consumers who purchased the product who can be readily identified or traced when a defect, which originated at the time the product was manufactured and was unforeseeable at the point of sale, is discovered to present a life threatening hazard." Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299, 1313 (1993).

As trial approached, plaintiffs narrowed somewhat the focus of their allegations. They maintained that two

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[2] Kansas substantive law governed this action. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

defendants (LSDHC Corp. and Lear Siegler Diversified) were responsible under theories of legal successor liability for the original manufacturer's defective design and failure to warn. In addition, they claimed LSDHC breached a post-sale duty to warn. However, plaintiffs expressly abandoned any claim that TIC United Corp., the petitioner herein, was liable as a legal successor for the original manufacturer's deficiencies. April 28, 1994 Hearing Tr. at 81. As of the beginning of trial, the only claim directed toward TIC was that it should have provided warnings to prior purchasers of the cultivator.

Shortly after trial began, LSDHC and Lear Siegler Diversified settled with plaintiffs, leaving TIC the sole defendant. Tr. 1045, 1058-60. During the presentation of evidence, plaintiffs maintained two bases for recovery against TIC. The first was the new duty recognized by the Kansas Supreme Court in its answers to certified questions in this case. The other was a form of successor liability previously established in Stratton v. Garvey Int'l Inc., 9 Kan. App. 2d 254, 676 P.2d 1290, 1294 (1984): a successor corporation bears a duty to warn of defects in its predecessor's products when it has knowledge of the defect and a sufficient relationship to the predecessor's customers. Plaintiffs argued for the admission of evidence relevant to both theories.

By the end of the trial, however, the Stratton theory had disappeared. Plaintiffs did not request, and the district court did not give, any instructions to the jury incorporating the Stratton formulation. Tr. 1405-1409, 1412-1415, 1532-1534. The only post-sale warning instruction tracked exactly with the language of the Kansas Supreme Court's answer to the certified questions in this case. Id. The district court made no findings that the duty recognized in Stratton applied to this case, and the verdict form did not include any request for findings of fact relevant to the elements of Stratton. Thus, the

only theory that went to the jury against TIC was the newly-recognized post-sale duty to warn.

The case was submitted to the jury on this basis, and on May 17, 1994, the jury returned a verdict in favor of plaintiffs. TIC was found seventy-six percent liable for its post-sale failure to warn. The jury also found TIC had acted wantonly. In accordance with the governing law, the district court held a separate hearing to determine whether to award and in what amount to award punitive damages. TIC objected to the imposition of punitive damages, arguing that the theory upon which the jury returned its verdict -- post-sale duty to warn -- had never been recognized in Kansas prior to the Kansas Supreme Court's answers to certified questions in this very action. Imposition of punitive damages would therefore violate constitutional due process guarantees because TIC lacked any notice that its conduct was tortious, let alone sufficiently heinous to warrant punitive liability.

The district court rejected TIC's constitutional challenge. On July 25, 1994, it entered judgment awarding plaintiffs an additional $1,000,000 in punitive damages. TIC appealed this judgment on several grounds, including violation of due process, to the United States Court of Appeals for the Tenth Circuit. App. A-1, et. seq. The Tenth Circuit affirmed the district court's judgment in all respects on February 16, 1996. App. A-21. TIC did not file a petition for rehearing, choosing instead to proceed directly to this Court.

REASONS FOR GRANTING THE WRIT

TIC United Corp. has been subjected to the civil equivalent of an *ex post facto* law. Punitive damages have been assessed against it for breach of a duty that did not exist at the time it engaged in the conduct (or, more precisely, in the omission of conduct) for which the courts later decided to

penalize it. Indeed, the duty it allegedly breached did not exist until it was recognized in this very case. TIC had no notice that it had an obligation under Kansas law to seek out prior purchasers of Wil-Rich cultivators to warn them of risks which had come to TIC's attention long after the original sale of those cultivators. It had no notice that failing to do so would subject it to tort liability, let alone liability for punitive damages.

This Court has acknowledged the importance of due process in punitive damages cases, and the importance of notice as a fundamental element of due process. This Court has not, however, had the opportunity to develop fully the role and nature of notice as a necessary predicate to the constitutional imposition of punitive damages. This case therefore presents an important and unsettled issue of constitutional law which merits this Court's attention.

I. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW.

In the context of the civil justice system, due process may well be the most important right guaranteed by the United States Constitution. Due process goes to the very essence of our courts. It requires nothing less than the basic elements of fundamental fairness in all judicial proceedings. Browning-Ferris Ind. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989). Fairness is, of course, the heart of any rational system of justice. A system without strong and meaningful guarantees of due process is therefore suspect.

This Court has left no doubt that constitutional due process requirements apply to proceedings to impose punitive damages. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18-19 (1991) ("general concerns of reasonableness and

adequate guidance from the court when the [punitive damages] case is tried to a jury properly enter into the constitutional calculus"); Browning-Ferris Ind., 492 U.S. at 276 ("[t]he parties agree that due process imposes some limits on jury awards of punitive damages").

This Court has also determined that one significant aspect of due process is adequate notice to the defendant that its conduct is unlawful and could result in punitive action. This principle has long been recognized in the context of criminal laws. This Court summarized the notice requirement thirty years ago:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966), citing Baggett v. Bullitt, 377 U.S. 360 (1964); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

This aspect of due process is critical because one should be given the chance to live lawfully. Only when the law is known can it be followed. As this Court noted recently:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal

> effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Landgraf v. USI Film Products, ___ U.S. ___, 114 S. Ct. 1483, 1497 (1994), quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). A justice system lacking this element of due process would be fundamentally unfair because it could punish anyone, at any time, simply by determining after the fact that some conduct was wrongful.

Given the quasi-criminal nature of punitive damages,[3] notice is an essential element of fundamental fairness in punitive damages proceedings. No defendant should be cast as morally reprehensible and subjected to exemplary liability unless it could have known at the time that its conduct was prohibited. This Court has recognized the applicability of the notice requirement to punitive damages cases: "In any event, the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct."

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[3] Punitive damages are awarded only when the defendant's behavior is judged not merely inadequate, but morally culpable. In Kansas, for instance, punitive damages are justified only when the defendant acted wantonly, willfully, fraudulently or with malice. Kan. Stat. Ann. sec. 60-3702(c). A punitive damages award also requires a more stringent level of proof than a standard civil award. See, e.g. Kan. Stat. Ann. sec. 60-3702(c) (plaintiff must prove punitive damages claim by clear and convincing evidence). Furthermore, punitive damages are awarded not to compensate the victim for actual injuries, but to punish the defendant and deter similar wrongful conduct. See Folks v. Kansas Power & Light Co., 243 Kan. 57, 755 P.2d 1319, 1322 (1988). These factors can be said to make punitive damages a "quasi-criminal" remedy as opposed to a mere variant of tort liability.

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 2724 (1993). Conversely, if prior law did not "fairly indicate[]" the possibility of punitive damages, due process has not been served.

The principle of adequate notice of punitive liability is increasingly important. Punitive damages claims have become a routine feature of litigation in this country, particularly against corporate defendants. A high percentage of tort lawsuits, especially product liability suits, include claims for punitive damages as a matter of course. A vast array of groups have come to recognize the rising importance of punitive damages and the need to control their availability. See, e.g., Haslip, 499 U.S. at 9 n.4 (citing twelve *amicus* briefs in that case). At the same time the courts have seen a steady push to recognize new causes of action and new theories of recovery, as well as calls for imposition of new statutory and legal duties on many industries. It follows that unless constitutional notice requirements are enforced, product liability defendants are exposed to the unpredictable and unquantifiable risk of a punitive award for any course of conduct that might someday fall within the ambit of a new theory or duty. Because this risk is real and growing, and because it constitutes a threat to the prime constitutional guarantee of a fair judiciary, this Court should grant a writ of certiorari to review the punitive damages award in this case.

II. TIC WAS SUBJECTED TO PUNITIVE DAMAGES WITHOUT DUE PROCESS OF LAW.

A. Kansas Did Not Recognize a Post-Sale Duty to Warn Until the Kansas Supreme Court Answered Certified Questions in This Case.

This case squarely presents this Court with an opportunity to address the notice element of due process in punitive damages cases. Contrary to the opinion of the court of appeals, TIC was denied sufficient warning that it might be subjected to punitive damages based upon its conduct with regard to this cultivator. The duty TIC was found to have breached did not exist under Kansas law prior to this case. No Kansas decisions presaged the post-sale duty to warn recognized in response to the district court's certified questions. In the absence of notice, TIC's right to due process must therefore invalidate the award of punitive damages in this lawsuit.

The Kansas Supreme Court, in answering the certified questions, was explicit about the lack of any post-sale duty to warn prior to this case. The court termed its task "a first impression products liability case." Patton, 861 P.2d at 1303. It carefully examined previous Kansas decisions and concluded that, although they "do not signal rejection of a post-sale duty to warn," they were distinguishable and did not recognize such a duty. Patton, 861 P.2d at 1309-10 (discussing Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038, cert. denied, 469 U.S. 965 (1984); State ex rel. Stephan v. GAF Corp., 242 Kan. 152, 747 P.2d 1326 (1987); Stratton v. Garvey Int'l Inc., 9 Kan. App. 2d 254, 676 P.2d 1290 (1984)).

The analytical approach of the Kansas Supreme Court also demonstrated that it was making new law, not merely applying an existing duty to a new set of facts. The court

examined the manner in which various jurisdictions have approached the post-sale warning question. Patton, 861 P.2d at 1311-13. It drew guidance from other courts because it had not itself previously addressed the question presented. Ultimately, the Kansas Supreme Court did not extend existing law, it expressly recognized a new legal duty:

> We recognize a manufacturer's post-sale duty to warn ultimate consumers who purchased the product who can be readily identified or traced when a defect, which originated at the time the product was manufactured and was unforeseeable at the point of sale, is discovered to present a life threatening hazard.

Patton, 861 P.2d at 1313 (emphasis added). In other words, the Kansas Supreme Court examined Kansas law as it stood in 1993 and did not find a post-sale duty to warn. It thereupon did what state supreme courts are charged with doing, and decided, after considering a number of factors, that there should be such a duty. It is fundamentally incongruous, therefore, to conclude that in 1990, three years earlier, the duty was so well established that TIC should have anticipated that it would be subjected to punitive damages for its breach.

The district court's decision to certify questions to the Kansas Supreme Court also demonstrates the lack of notice. Under Tenth Circuit law, the district court could not properly certify the question unless the Kansas courts truly had not resolved the law at issue. Anaconda Minerals Co. v. Stoller Chem. Co., 990 F.2d 1175, 1177 (10th Cir. 1993). Certification is improper if the state courts have provided so much as an indication of the direction in which they are leaning or an analytical method applicable to the problem.

Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988). Certification in the face of any existing indication of state court tendencies would be a derogation of the district court's duty to predict how the state courts would rule if confronted with the issue. Fields v. Farmers Ins. Co., 18 F.3d 831, 834 (10th Cir. 1994); Adams-Arapahoe School Dist. No. 28-J v. GAF Corp., 959 F.2d 868, 871 (10th Cir. 1992).

The district court's decision to certify the post-sale duty to warn question, then, was a statement that it lacked state court precedent on the matter. Certification is reserved for truly exceptional cases, not routine instances of incomplete explication of an existing legal principle. Armijo, 843 F.2d at 407 ("[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law"). Certification in this case, therefore, was an admission by the district court that the law did not, without further guidance from the Kansas Supreme Court, impose a duty upon TIC. If the district court could not have discerned that TIC bore a post-sale duty to warn, certainly TIC could not have known. It is fundamentally unfair to assess punitive damages against a party that could not know its conduct was prohibited.

B. The Court of Appeals Erroneously Relied Upon Inapplicable Precedent to Find that TIC Had Notice of Potential Liability.

The court of appeals, like the district court, relied heavily upon the prior Tenth Circuit decision in Southwest Forest Ind., Inc. v. Sutton, 868 F.2d 352 (1989) in rejecting TIC's constitutional challenges to the punitive damages award. That case, however, both demonstrates the lower courts' error and illustrates the distinction between adequate notice and TIC's circumstances. In that case, a worker covered by a collective

bargaining agreement brought a tort action against his employer on the theory of retaliatory discharge. He obtained a verdict, which the employer challenged on the ground that Kansas law did not recognize the cause of action. While the appeal was pending, the Kansas Supreme Court overturned prior decisions upon which the employer had relied. The employer requested that those decisions not be applied retroactively. Southwest Forest, 868 F.2d at 353. The Tenth Circuit disagreed and held that the employer's conduct was actionable.

While it is true that the Tenth Circuit in Southwest Forest concluded that the employer had sufficient notice from prior law that its conduct could be considered tortious,[4] the state of the law before the court was markedly different from this case. The plaintiff in Southwest Forest was discharged in 1982. In 1981, the Kansas Court of Appeals decided Murphy v. City of Topeka--Shawnee County Dept. of Labor Services, 6 Kan. App. 2d 488, 630 P.2d 186 (1981). Murphy recognized a cause of action for retaliatory discharge, and although the plaintiff in that case was not covered by a collective bargaining agreement, the court's public policy rationale for recognizing the claim was not limited to at-will employees. Southwest Forest, 868 F.2d at 354. No Kansas decisions questioned the extension of the cause of action to covered employees until 1986. See Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456, 459 (1986); Smith v. United Technologies, Essex Group, Inc., 240 Kan. 562, 731 P.2d

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[4] Southwest Forest was not, however, a due process case, merely a determination of whether Kansas Supreme Court decisions should be applied retroactively. The Tenth Circuit was not relying upon this Court's due process standards, but was instead construing and applying the Kansas Supreme Court's standards for determining whether a decision has retroactive application. See Southwest Forest, 868 F.2d at 354, citing Vaughn v. Murray, 214 Kan. 456, 521 P.2d 262, 269 (1974).

871, 880 (1987). Thus, at the time of the disputed conduct, the only decision addressing the issue had determined the conduct was actionable.

By contrast, in this case no Kansas opinions had recognized a cause of action for failure to provide post-sale warnings of a newly-discovered product hazard. Unlike the defendant in Southwest Forest, TIC had no basis upon which it could have concluded that it bore a duty under Kansas law to provide such warnings. The district court and court of appeals erred when they relied upon Southwest Forest and overlooked this critical distinction.

C. The Court of Appeals Erroneously Determined that Prior Kansas Law Imposed a Post-Sale Duty to Warn Upon TIC.

The court of appeals also erred in determining that a previous Kansas Court of Appeals case, Stratton v. Garvey Int'l Inc., 9 Kan. App. 2d 254, 676 P.2d 1290 (1984), put TIC on notice of potential liability. Stratton recognized that a legal successor to a manufacturer of a defective product may bear a duty to warn the predecessor's customers of that defect if it has (1) knowledge of the defective condition, and (2) a sufficiently close relationship to the predecessor's customers. Stratton, 676 P.2d at 1294. The court of appeals concluded that this duty applied to TIC and therefore it had notice its conduct might be actionable. This conclusion is in error and represents a significant infringement on TIC's due process rights.

Stratton could not have given TIC notice of potential liability because the duty it created simply did not apply to this situation. Stratton applied only to legal successor corporations. See 676 P.2d at 1294 ("there appears to be a two-pronged burden which the plaintiff must meet to establish

the duty of the successor entity to warn"). While TIC was undoubtedly a subsequent purchaser of some of the original manufacturer's assets, it was never found to be a legal successor corporation. In fact, prior to trial plaintiffs abandoned their claims of legal successor liability against TIC. Although they expressly preserved their Stratton-based claims at that time, they did not seek to prove the successorship which is a prerequisite to the Stratton duty.

Moreover, the duty recognized in Stratton is premised exclusively upon defects existing when the product left the original manufacturer's control, and knowledge which the original manufacturer had or should have had at the time of sale, not upon knowledge that comes later. The Stratton duty is, in essence, a duty on the part of a successor who meets the specified criteria to remedy the deficiencies of the original manufacturer, "to warn where defects in a predecessor's products come to [the successor's] attention." Stratton, 676 P.2d at 1294, quoting Gee v. Tenneco, Inc., 615 F.2d 857, 866 (9th Cir. 1980). The duty extends to those successors that, through continued contact with the predecessor's products in the course of serving past customers, learn that the product as originally sold was in fact defective. See, e.g., Stratton, 676 P.2d at 1296 ("there is no showing that these casual contacts [with the predecessor's customers] brought, or should have brought, any defects in [the predecessor's] construction to the attention of [the successor].").

The duty delineated by Stratton, however, is fundamentally different from the duty announced in Patton, the duty which TIC allegedly breached. The product hazard of which TIC supposedly should have warned was by definition not foreseeable when the product left the original manufacturer's control. While the jury did find that the cultivator was defective at the time of sale, and that the original manufacturer should have warned of that defect, the

district court and the Court of Appeals expressly distinguished between the hazard originally in existence, which might have been the subject of a Stratton duty, and the later-appearing hazard about which the jury found TIC should have warned.[5] See Opinion of Court of Appeals at A-8–A-9. Although plaintiffs had earlier preserved their Stratton claims against TIC when they abandoned their other successor liability claims prior to trial, plaintiffs did not request, and the district court did not give, any jury instructions setting forth the Stratton criteria, nor did the special verdict form ask the jury to make any findings relevant to the Stratton duty. Thus, any attempt to prove that TIC met the criteria for liability under Stratton fell out of this case prior to the verdict.[6]

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[5] In fact, this distinction was critical to the Court of Appeals' decision upholding the compensatory award. Had this distinction not been drawn, TIC would have been absolved of liability. The Kansas Supreme Court held that a post-sale duty to warn arises only when the defect "was unforeseeable at the time of sale." Patton, 861 P.2d at 1313. Since foreseeability of the risk is a necessary prerequisite to a duty to warn, the jury's finding that the original manufacturer bore a duty to warn precluded a finding that TIC had a post-sale duty to warn of the same risk.

[6] The comments of the trial court in the post-trial proceedings underscored that TIC's liability was premised upon the duty announced in Patton, and not the duty announced in Stratton. See Tr. 1812-13 ("I gather Mr. McCallister's argument to be that Stratton vs. Garvey doesn't apply and doesn't control, but that Stratton vs. Garvey is another sort of beacon on the road to the harbor of Patton vs. Wil-Rich that points the way to what the conclusion of the Kansas Supreme Court was going to be, because it emphasized some of the very same factors that the Kansas Supreme Court ultimately did find to be important in finding the post-sale duty to warn here."). Indeed, if TIC's liability had, in the trial court's opinion, been based on Stratton, the court would have had no reason to engage in its laborious refutation of TIC's due process objections, because liability under Stratton had been a part of Kansas law for over a decade.

The distinction between the duty imposed by Stratton under certain, carefully defined circumstances to take remedial post-sale steps where the original manufacturer has fallen short of its obligations at the time of sale, and the duty imposed by Patton to provide post-sale warnings in the face of new information is not a trivial one.[7] It is a fundamental principle of product liability law that a product and the manufacturer should be judged as of the time of sale, and not subjected to perpetual re-evaluation in light of continually evolving technology and information. See, e.g., Romero v. International Harvester Co., 979 F.2d 1444, 1450 (10th Cir. 1992) ("the [product] must have been defective and unreasonably dangerous *at the time it was sold* in order for Colorado law to impose a post-sale duty to warn."); see also Restatement (Second) of Torts, §402A, *comment g* ("[t]he rule set forth in this section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."); Restatement (Third) of Torts: Products Liability, §2, *comment a* (Tentative Draft No. 2, March 13, 1995) ("For the liability system to be fair and efficient, most courts agree that the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution....For these reasons, §§2(b) and 2(c) speak of products being defective only when risks were reasonably foreseeable.") Thus, any decision to impose, as Patton did, a duty upon a manufacturer or its successor (let alone an entity

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[7] If the distinction were inconsequential, the district court would have had no need, or right, to certify, and the Kansas Supreme Court could have written a much shorter opinion, or refused to accept the case at all.

which is neither) to take action in response to information that was not known and not foreseeable at the time of sale represents a significant departure from the underlying law, and is not simply an extension of the case law which requires a successor to take responsibility for the time-of-sale failings of its predecessor.

III. THE QUESTION PRESENTED IS A CONSTITUTIONAL ISSUE IN NEED OF FURTHER DEVELOPMENT BY THIS COURT.

This Court has acknowledged that notice is an element of due process in punitive damages cases. See TXO Prod. Corp, 113 S. Ct. at 2724. However, as the instant case demonstrates, the need of the district and appellate courts for this Court's guidance does not end with that acknowledgment. The reference to notice in TXO is brief, and the body of underlying law is thin. An examination of this Court's treatment of the notice issue reveals the need to grant certiorari in this case.

TXO, as this Court's most direct statement on notice in punitive damages cases, provides an appropriate starting point for this analysis. The pronouncement in TXO comes across in the clear, unqualified language that suggests a rule: "In any event, the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." TXO Prod. Corp., 113 S. Ct. at 2724. However, the Court disposed of the petitioner's notice challenge in a single paragraph at the end of the extensive plurality opinion, without detailed analysis.

This Court's decision in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), cited in TXO in its discussion of the element of notice, gives no further guidance on the nature

of the notice requirement in a punitive damages case such as the one presented here. In Haslip, the Court was responding to plaintiff's claim that the jury was not given sufficient guidance regarding the permissible range of punitive damages it could award:

> Pacific Mutual also makes what it calls a void-for-vagueness argument and, in support thereof, cites Giaccio v. Pennsylvania, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). That case, however, is not helpful. The Court there struck down a Pennsylvania statute allowing costs to be awarded against a defendant acquitted of a misdemeanor. The statute did not concern jury discretion in fixing the amount of costs. Decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred.

499 U.S. at 24 n.12. This passage does not shed light on the notice issue presented in this case.

Members of this Court have previously suggested that the notice of potential punitive liability is a due process issue "worthy of the Court's attention in an appropriate case." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring, joined by Scalia, J.) (petitioner challenged retroactive application of change in Mississippi's standard for imposing punitive damages on an insurer, and also raised supplemental attack on permitting juries to impose unlimited punitive damages; Court properly declined to consider due process because petitioner failed to adequately raise the issue below or in principal submissions to Court). See

also, Landgraf v. USI Film Prod., 114 S. Ct. 1483, 1505-1506 (1994) ("Retroactive imposition of punitive damages would raise a serious constitutional question. . . . Before we entertained that question, we would have to be confronted with a statute that explicitly authorized punitive damages for preenactment conduct. The [statute in question] contains no such explicit command.")

This case squarely presents the Court with an appropriate opportunity to address the retroactive imposition of punitive damages in a civil case, and this Court should not pass it up. Nearly every case in which this Court has devoted serious attention to the notice element of due process has involved criminal law. See, e.g. Giaccio, 382 U.S. at 402-403. While these cases can provide some principles generally applicable to civil awards of punitive damages, they do not adequately address such situations. Guilt under criminal statutes may occasionally be vague, but the criminal law is significantly more stable and distinct than tort liability, which is usually governed by common law. The sometimes overlapping, vague or underdeveloped bases for civil liability present a different due process context than does the criminal law. This Court should resolve any confusion that may exist by granting certiorari, explicitly recognizing that due process requires adequate notice of possible punitive liability, and providing guidance on the nature and parameters of this element of due process.

In recent years, this Court has reaffirmed the need for constitutional safeguards for defendants in punitive damages cases. See, e.g. Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, 114 S. Ct. 2331 (1994); TXO Prod. Corp., 509 U.S. 443; Haslip, 499 U.S. 1. The guidance has been invaluable. These decisions, though, have left a serious gap in the law. The punitive damages cases decided to date have not provided analysis of notice, an important component of fundamental

fairness. This case can fill that gap, and therefore this Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BOWMAN AND BROOKE
Hildy Bowbeer
Counsel of Record
150 South Fifth Street
Suite 2600
Minneapolis, Minnesota 55402
Telephone: (612) 339-8682

Counsel for Petitioner

INDEX TO THE APPENDIX

JUDGMENT AND OPINION OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FEBRUARY 16, 1996 ..... A-1

PATTON v. TIC UNITED CORP., 859 F. SUPP. 509 (D. KAN. 1994) A-22

PATTON v. HUTCHINSON WIL-RICH MFG. CO., 861 P.2d 1299 (KAN. 1993) A-37

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RYAN M. PATTON and KATHY PATTON STRUNK,	)	
Plaintiffs - Appellees/Cross-Appellants,	)	
	)	No. 94-3296
v.	)	No. 94-3297
TIC UNITED CORP., a Delaware corporation,	)	
Defendant - Appellant/Cross-Appellee.	)	
IMPLANT DEVICE EDUCATION ASSOCIATION; THE WICHITA AREA SUPPORT GROUP FOR THE SURVIVORS OF SILICONE BREAST IMPLANTS; KANSAS TRIAL LAWYERS ASSOCIATION; COLORADO TRIAL LAWYERS ASSOCIATION; DEFENSE RESEARCH INSTITUTE, INC.; PRODUCT LIABILITY ADVISORY COUNCIL, INC.,	)	
Amici Curiae.	)	

Appeals from the United States District Court
for the District of Kansas
(D. Ct. No. 91-2331-JWL)

Hildy Bowbeer (George W. Soule and Cortney G. Sylvester, with her on the brief), Bowman & Brooke, Minneapolis, Minnesota, for Appellant/Cross-Appellee.

Gary D. McCallister (Brenda L. Head, with him on the brief), Davis, Unrein, Hummer, McCallister & Buck, Topeka, Kansas, and Jerry R. Palmer (L.J. Leatherman, with him on the brief), Palmer & Lowry, Topeka, Kansas, for Appellees/Cross-Appellants.

Andrew Oswald, Oswald, Oswald & Associates, Hutchison, Kansas, and Leland P. Anderson, Sears Anderson & Swanson, Denver, Colorado, for *amici curiae* Kansas Trial Lawyers Ass'n and Colorado Trial Lawyers Ass'n.

Mark B. Hutton, Wichita, Kansas, for *amici curiae* Implant Device Education Ass'n and Wichita Area Support Group for the Survivors of Silicone Breast Implants.

Kevin M. Reynolds and Richard J. Kirschman, Whitfield & Eddy, P.L.C., Des Moines, Iowa, for *amicus curiae* Defense Research Institute, Inc.

Hugh F. Young, Jr., Reston, Virginia, Kenneth S. Geller and H. Thomas Byron III, Mayer, Brown & Platt, Washington, D.C., for *amicus curiae* Product Liability Advisory Council, Inc.

Before **LUCERO** and **MURPHY**, Circuit Judges, and **JENKINS***, District Judge.

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* The Honorable Bruce S. Jenkins, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

LUCERO, Circuit Judge.

We review appeals from a final judgment in a products liability diversity action. The defendant appeals the jury verdict against it as well as the court's imposition of punitive damages. The plaintiffs, by cross-appeal, challenge the district court's application of a Kansas damage cap, Kan. Stat. Ann. § 60-19a02, to reduce the jury's award of noneconomic damages. We affirm.

I

Ryan Patton was raised on his family's farm in Hiawatha, Kansas. His father purchased a Wil-Rich vertical wing cultivator in 1977. The 23-foot-wide cultivator has two eight-foot-long wings which can be lifted to a 90-degree angle and locked in position for ease of transport or storage. The wings are lowered for use. A hydraulic system is used to lift, lower, or steady the wings. Manually-inserted safety pins lock the wings in an upright position. When the pins are removed, hydraulic pressure alone keeps the 2000-pound wings erect.

Patton knew how to replace the hydraulic cylinder used to raise and lower the wings of the cultivator. When first attached, a new hydraulic cylinder is not charged. To insure that the cylinder will support a wing, the operator must cycle the machine to make sure that the hydraulic system is fully charged before removing the safety pin. The operating instructions did not state how to insure that the hydraulic system was properly charged or warn that the wings should not be in an upright position when replacing the cylinder. The only warning on the machine relating to the hydraulic wings read: "Pull wing pins before lowering wings."

In April, 1990 Patton and Kenneth Clements, a farm employee, set out to change the hydraulic cylinder on the

cultivator. Because the day was cool and rainy, the pair decided to work inside the machine shed. The shed was too small to permit the wings to be fully lowered while changing the cylinder. Clements attached a new cylinder to the mainframe and hydraulic lines. Patton retracted the cylinder to make sure that the wings were fully raised. He then pulled the hydraulic lever for several more seconds, believing that this would fully charge the hydraulic cylinder. Unaware that the cylinder was in fact not completely charged, he stood under the wing and attempted to pull the wing pin. He encountered pressure or "binding" on the pin, as he had many times before. Although he knew that one possible cause of binding was that the cylinder was not charged, he had no way to verify his belief that he had fully charged the cylinder. He pushed up on the wing and pulled the pin. The wing fell, pinned Patton to the ground, and severed his spine.

The cultivator that injured Patton was manufactured by Wil-Rich, Inc., at its factory in Wahpeton, North Dakota. Between 1981 and 1987 the assets and stock of Wil-Rich were transferred among a number of entities through merger, acquisition, and reorganization. In 1987, a wholly owned subsidiary of defendant TIC United Corp. (TIC) purchased the assets, business, goodwill and trade name of the former Wil-Rich, Inc. The subsidiary merged with its parent, TIC, in 1993. TIC continued to operate the Wahpeton facility and market cultivators under the name "Wil-Rich."

Plaintiffs sued TIC and various of its predecessors in federal district court, alleging that the original design was defective because it encouraged operators to stand under the cultivator wing when they removed the safety pin, making it likely that they would be severely injured in the event of hydraulic failure. They also argued that, as a successor to the Wil-Rich, Inc. product line, TIC incurred various duties when it learned of accidents of the type that injured Patton.

The district court certified four questions to the Kansas Supreme Court regarding the extent to which Kansas recognizes a manufacturer's post-sale duties to retrofit, recall, or warn of known defects in its products. See Patton v. Hutchison Wil-Rich Mfg. Co., 861 P.2d 1299, 1303-04 (Kan. 1993) ("Patton I"). The Kansas high court recognized a manufacturer's post-sale duty to warn "ultimate consumers who purchased the product who can be readily identified or traced when a defect, which originated at the time the product was manufactured and was unforeseeable at the point of sale, is discovered to present a life threatening hazard." Id. at 1313.

All defendants except TIC settled with the plaintiffs and were dropped from the lawsuit before the case went to the jury. The jury returned a verdict for the plaintiffs. It attributed two percent of the fault for the accident to Patton, two and one half percent to his father, eighteen and one half percent to Lear Siegler, corporate successor to the original manufacturer, and seventy-six percent to TIC. The jury also attributed one percent of the fault to an entity that had briefly owned the Wil-Rich assets. The jury found that Patton had suffered economic damages in the form of future medical expenses totaling $850,501, and that Patton and his mother had incurred medical and renovation expenses of $142,572.17. The jury also found that Patton had suffered noneconomic damages in the amount of $752,781. Pursuant to Kansas' statute capping liability for noneconomic damages in personal injury cases, Kan. Stat. Ann. § 60-19a02(b), the court reduced Patton's award for noneconomic damages to $250,000. The court also entered judgment against TIC for seventy-six percent of the economic damages award. After a hearing, the district court assessed punitive damages against TIC in the amount of $1,000,000. Patton v. TIC United Corp., 859 F. Supp. 509 (D. Kan. 1994) ("Patton II"). Patton's motion to reinstate the full jury award of noneconomic damages was

denied, as were TIC's motions for judgment as a matter of law or, in the alternative, for a new trial. TIC then appealed and Patton cross-appealed.

II.

TIC's arguments on appeal follow three separate themes: First, the district court should have granted TIC judgment as a matter of law because it had no duty to warn plaintiffs about the cultivator or, alternatively, because the failure to warn was not the proximate cause of Patton's injuries. Second, the district court should have granted its motion for a new trial because the jury's verdict attributing seventy-six percent of fault to TIC was not supported by evidence. Finally, the district court's award of punitive damages was unsupported by evidence and violated due process.

We review *de novo* the denial of a motion for judgment as a matter of law under Fed. R. Civ. P. 50. Sheets v. Salt Lake County, 45 F.3d 1383, 1387 (10th Cir. 1995). We will reverse if the evidence, viewed in the light most favorable to the nonmoving party, along with all reasonable inferences drawn therefrom, points only towards a verdict for the moving party. Id. We review the district court's denial of a motion for a new trial for abuse of discretion. Id. at 1390.

A.

TIC first argues that it had no duty to warn Patton of any dangers because, under Kansas law, a post-sale duty to warn applies only to the manufacturer of the specific cultivator that injured Patton. We review the district court's interpretation of Kansas law *de novo*. Salve Regina College v. Russell, 499 U.S. 225, 231 (1991).

In Patton I, the Kansas Supreme Court addressed the post-sale duties of a product's original manufacturer. The

court limited its discussion to the certified questions before it, Patton I, 861 P.2d at 1306, and left open the possibility that a party other than the original manufacturer could be held liable for a post-sale failure to warn. "The resolution of successor liability and ultimate liability, if any, is the business of the federal district court." Id. at 1305.

The Kansas Court of Appeals held that a "successor entity" bearing no corporate relationship to the original manufacturer may incur a duty to warn if it has knowledge of the defective condition of the predecessor's product, and has a "more than casual" relationship with the customers of the predecessor entity that is an "economic benefit" to the successor. Stratton v. Garvey Int'l, Inc., 676 P.2d 1290, 1294 (Kan. Ct. App. 1984) (affirming judgment for successor because its relationship to its predecessor's customers was too tenuous). We agree with the district court that Stratton, alone or read together with Patton I, extended a post-sale duty to warn to TIC. Here, the district court could find both of the Stratton requirements. Evidence showed that TIC knew that operators of the Wil-Rich vertical wing cultivator were being seriously injured in accidents like Patton's, and TIC benefitted economically from its relationship with its predecessors' customers through its authorized Wil-Rich dealer network.

TIC argues that the elements of the Stratton test should have been submitted to the jury, or, alternatively, that plaintiffs abandoned the Stratton theory. The case went to the jury on a general verdict form with special interrogatories. See Fed. R. Civ. P. 49(b). TIC did not ask the court to instruct the jury on the elements of Stratton successor liability, instead stating that the Stratton issue was a question of law for the court to resolve. TIC did not submit a jury instruction or verdict form requesting specific findings on the elements of Stratton. It did not object to the absence of Stratton-type factual findings before the jury was excused. TIC therefore waived this

objection. Kloepfer v. Honda Motor Co., 898 F.2d 1452, 1456 (10th Cir. 1990).

From the record it is clear that plaintiffs relied on the Stratton theory, referred to by plaintiffs under that name and as the "product line successor" theory, throughout the trial. The court admitted some evidence for the limited purpose of showing Stratton-type liability. At a hearing before trial, counsel for TIC acknowledged that plaintiffs' theory was that "TIC is a successor in the Stratton versus Garvey sense." TIC points to plaintiffs' concession, in post-trial argument over punitive damages, that Stratton does not control Patton I's analysis regarding a manufacturer's post-sale duty to warn, and interprets that remark as a waiver of plaintiffs' successor liability theory. We do not read counsel's statement, made in an unrelated context, to amount to a waiver or abandonment of plaintiffs' theory of the case.

B.

Responding to special interrogatories, the jury divided Lear Siegler's fault among the theories of design defect, point-of-sale failure to warn, and post-sale failure to warn. Because Kansas recognizes a post-sale duty to warn only as to hazards unforeseeable at the point of sale, Patton I, 861 P.2d at 1313, TIC claims that the jury's determination that Lear Siegler breached a point of sale duty to warn is inconsistent with its finding that TIC was also liable. When reviewing claims that a jury verdict is inconsistent, we must accept any reasonable view of the case that makes the jury's answers consistent. Palmer v. City of Monticello, 31 F.3d 1499, 1505 (10th Cir. 1994).

The district court reconciled the alleged inconsistency by interpreting the jury's answers as relating to two separate and distinct dangers. The pleadings and evidence raised the issue of whether Lear Siegler breached a point of sale duty to warn

users that they should not stand under the cultivator wing, a general risk that was known to the manufacturer at the time of sale. The pleadings and evidence also raised the separate issue of whether TIC breached a post-sale duty to issue a warning specifically tailored to address the danger that befell Patton: An operator might pull the safety pin under a mistaken belief that the hydraulic system would function properly.

Under the theories and evidence presented by plaintiffs, the jury could properly find the original manufacturer negligent for its failure to warn users not to stand under the wing and to apportion fault for such negligence. The jury could also properly apportion fault among the successor entities for the breach of a post-sale duty to warn specifically that the wings should be lowered before any maintenance is performed. Two duties were breached, each partially responsible for the accident. The district court's reconciliation of the jury's answers was reasonable.

C.

TIC next contends that, as a matter of law, its failure to warn could not have caused Patton's injury because plaintiffs proposed no adequate warning and presented no evidence that he would have heeded a warning. In fact, plaintiffs introduced numerous possible warning stickers and language that could have been included in the owner's manual, along with expert testimony explaining why the proposed warnings would work. Under Kansas law, a manufacturer's failure to provide an adequate warning creates a rebuttable presumption of causation. Richter v. Limax Int'l, Inc., 45 F.3d 1464, 1471-72 (10th Cir. 1995). Here, TIC provided no warning at all. While TIC, on cross-examination of Patton, presented some evidence that could show that a warning would have made no difference, there was ample evidence for a jury to reach the opposite conclusion: Because it was not possible to inspect the

hydraulic cylinder to determine if it were charged, a warning addressing the risk presented likely would have been heeded. The jury verdict can properly be read as a finding that, whether or not TIC rebutted the presumption of causation, plaintiffs met their burden. See Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 547 (1990).

D.

TIC next claims that the district court erred in denying its motion for a new trial on the ground that the jury's allocation to it of seventy-six percent fault indicated that passion or prejudice influenced the verdict. TIC theorizes that after the other defendants settled, the jury took vengeance on it, the only available defendant, by allocating an indefensibly high percentage of the fault to the company, and argues that the district court abused its discretion by denying its motion for a new trial.

When reviewing an allegation that a jury's verdict was not supported by evidence, we view the record in the light most favorable to the prevailing party. Oklahoma Federated Gold & Numismatics, Inc. v. Blodgett, 24 F.3d 136, 142 (10th Cir. 1994). A motion for a new trial on the ground that the verdict is against the weight of the evidence presents a question of fact, not law, and we will not reverse unless the verdict is "clearly, decidedly, or overwhelmingly against the weight of the evidence." Brown v. McGraw-Edison Co., 736 F.2d 609, 616-17 (10th Cir. 1984) (quotation omitted).

The Kansas comparative negligence statute, Kan. Stat. Ann. § 60-258a, requires the jury to apportion the fault of those responsible for the injury. Arredondo v. Duckwall Stores, Inc., 610 P.2d 1107, 1110 (Kan. 1980); Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978). "Fault" is not a scientific concept; in apportioning fault, the jury must compare the defendant's behavior to the norm of care and determine

the degree to which the defendant deviated from that norm. See Ingram v. Acands, Inc., 977 F.2d 1332, 1341 (9th Cir. 1992) (upholding, under Oregon comparative fault statute, allocation of twenty-five percent fault to defendant when plaintiff was exposed to its asbestos products for only three months of his long career as an insulator).

The jury heard testimony that the risk of injury associated with falling cultivator wings could never be completely eliminated, and that no accidents of the type that injured Patton had occurred at the time of purchase of the cultivator. Thus, the jury could find that Lear Siegler could not be expected to issue a warning that would address the danger that ultimately befell Patton. Based on this evidence, the jury was also entitled to find that the defective design and point-of-sale failure to warn contributed to the accident but did not represent as great a departure from the norm of care as TIC's subsequent failure to warn. The jury's division of Lear Siegler's fault, assigning fifteen percent of the total fault to the post-sale breach but only one and one half percent to the point-of-sale breach, implies that the jury found the post-sale failure to warn the more culpable cause of Patton's injuries.

The evidence suggested that TIC had more information about dangers associated with Wil-Rich cultivators than Lear Siegler. TIC employed John Kehrwald as general manager of its Wil-Rich division. Kehrwald had held similar positions with the prior owners of Wil-Rich. He had investigated all accidents involving Wil-Rich vertical wing cultivators and knew of the potential for serious injury. TIC also knew, through due diligence conducted at the time it purchased the Wil-Rich assets, that several suits were pending against Lear Siegler regarding the same type of accident that occurred here. More accidental injuries came to light after TIC's purchase. Kehrwald, as chief engineer and later general manager of TIC's Wil-Rich division, did not take steps to warn of the evident danger. TIC knew that dealers kept lists of prior

purchasers of Wil-Rich equipment. As its primary defense, TIC relied on a brief conversation by Kehrwald with a competitor's employee to conclude that a warning program would not have been effective.

On the evidence, the jury could properly conclude that as time went on, TIC's departure from the standard of care was greater than that of its predecessors. The jury could see a failure to warn in 1990 as far more culpable than a breach of this duty in 1985, during the Lear Siegler era, when only one accident was known to have occurred. Thus, the jury's apportionment of fault was not clearly against the weight of the evidence. The district court did not abuse its discretion in declining to order a new trial.

E.

TIC next claims that the due process guarantees of the United States Constitution forbid imposing punitive damages on a cause of action that had not previously been recognized under Kansas law. The district court rejected the claim, finding that the due process was satisfied because prior Kansas case law gave TIC adequate notice of its duties. Patton II, 859 F. Supp. at 512. We review this question of constitutional law *de novo*. United States v. DeLuna, 10 F.3d 1529, 1534 (10th Cir. 1993).

TIC's position stems from the Kansas Supreme Court's statement that the certified questions regarding the extent of a manufacturer's post-sale duties to warn presented issues of first impression. Patton I, 861 P.2d at 1303. TIC contends that imposing punitive damages against it for conduct that had not, until Patton I, been considered tortious, is inconsistent with the notice requirement implicit in due process. See Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as

to the conduct it prohibits.") In short, it is fundamentally unfair to impose punitive damages on a party that had no notice that its behavior was punishable.

In support of its position, TIC cites Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497 (1993), for the proposition that punitive damages cannot constitutionally be applied retroactively. This, however, is not what Landgraf held, and the opinion sheds no light on the issue presented here. Landgraf addressed the question of whether Congress intended the punitive damages provisions of the Civil Rights Act of 1991 to apply retroactively to cases then pending before the courts. The Court noted that it would not ascribe to Congress the intent to have these provisions imposed retroactively, because to do so would raise constitutional concerns. Before deciding the constitutionality of such a law, the Court "would have to be confronted with a statute that explicitly authorized punitive damages for preenactment conduct. The Civil Rights Act of 1991 contains no such explicit command." Id. at 1506. Landgraf explicitly leaves open the question of whether there are constitutional limitations on the retroactive application of punitive damage statutes, and focuses its analysis on the unique powers of the legislative branch to upset settled expectations as to what the law requires. See id. at 1497. TIC complains of a punitive damage award arising from the application of evolving common law. We must look to other cases for guidance.

The Supreme Court has indicated that punitive damage awards are subject to scrutiny under the Due Process Clause. TXO Prod. Corp. v. Alliance Resource Corp., 113 S. Ct. 2711 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). However, both these recent cases deal primarily with the relationship due process may require between a punitive damages award and the actual damages incurred. They do not specifically address the notice requirement inherent in due process. Earlier in this century, the Supreme Court did hold

that due process forbids imposing a civil penalty where "[t]here was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct." Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 490 (1915). See also Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (retroactive application of unforeseeable judicial enlargement of criminal statute violated due process).

We glean relevant principles from these Supreme Court opinions. While not directly addressing vagueness challenges to the imposition of punitive damages, TXO implicitly recognized the continuing validity of Danaher's due process limitation. See TXO, 113 S. Ct. at 2718 and n.17 (plurality opinion). Also, in rejecting the defendant's vagueness challenge to a state court's imposition of punitive damages divorced from the amount of the compensatory damages award, the TXO plurality reformulated this aspect of due process, stating that "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." Id. at 2724 (citing Haslip, 499 U.S. at 24 n.12). Haslip itself recognized that due process concerns with notice that punitive damages might be awarded significantly differ from the concern that a party have notice that it violated the law. Haslip, 499 U.S. at 24 n.12.

We conclude from these decisions that the Due Process Clause permits imposing punitive damages if a party has fair notice that its acts were tortious, and if prior law indicates that the defendant's tortious conduct was sufficiently "egregious" to support an award of punitive damages. Cf. Southwest Forest Indus. v. Sutton, 868 F.2d 352 (10th Cir. 1989) (in response to claim that defendant justifiably relied on the nonrecognition of a common law duty in Kansas, finding that prior law provided defendant with sufficient notice that its conduct violated emerging duties of care and could result in a punitive damages award). Resolving the due process issue

thus involves two steps. First, we must determine whether TIC had sufficient notice that its conduct might be found tortious under Kansas law. Second, we inquire whether TIC had notice that punitive damages could be awarded in Kansas for wanton misconduct.

Kansas provides that the common law shall remain in effect absent constitutional or statutory modification. Kan. Stat. Ann. § 77-109. In Southwest Forest, we looked to Kansas antiretroactivity principles and held that the policies announced in prior case law were sufficiently broad to provide defendant with notice that its actions would also be found tortious under Kansas common law. 868 F.2d at 354. Though Southwest Forest does not address notice under the Due Process Clause, it does establish how to determine whether the extension of Kansas common law duties was fairly indicated in that state's case law.

In arguing that it had no notice that its conduct was tortious, TIC presumes that no cause of action previously existed in Kansas for a successor entity's failure to warn of defects in its predecessor's products. This is incorrect, because the Kansas Court of Appeals had already recognized such a cause of action. Stratton, 676 P.2d at 1294. TIC was not an original manufacturer; it was a successor who bought the manufacturer's assets. Stratton fairly indicated Kansas' policy that when a successor entity reaches out to the predecessor's customers for economic benefit, risk-benefit analysis favors recognition of a duty. See id. at 1296. Other Kansas cases likewise suggested the existence of post-sale duties to warn. See Patton II, 859 F. Supp. at 512 (collecting cases).

While Patton I does state that the certified questions presented issues of first impression, 861 P.2d at 1303, the questions involved the steps a manufacturer must take to locate its customers and whether Kansas recognized post-sale duties to retrofit or recall dangerous products. Id. at 1303-04.

The opinion noted that there was "no statutory limitation nor . . . precedential authority" suggesting that Kansas would reject a manufacturer's post-sale duty to warn. Id. at 1311. When TIC decided to forego any warning program regarding defects in the Wil-Rich cultivator, it cannot state that its acts, based on the principles of Kansas common law, represented "no departure from any prescribed or known standard of care." Danaher, 238 U.S. at 490.

The second step of the notice test is also satisfied. During the entire time TIC failed to implement a warning program, Kansas prescribed punitive damages upon a finding of "wanton, willful, fraudulent or malicious conduct." Kan. Stat. Ann. § 60-3702(c). We conclude that prior Kansas law fairly indicated that a "punitive damages award might be imposed in response to egregiously tortious conduct." TXO, 113 S. Ct. at 2724 (plurality opinion). The award of punitive damages against TIC did not offend due process.

F.

Finally, TIC argues that the evidence could not support the jury's finding its behavior wanton. A finding of wanton, willful, fraudulent or malicious conduct is a prerequisite to an award of punitive damages under Kansas law and must be proved by clear and convincing evidence. Kan. Stat. Ann. § 60-3702(c). On the spectrum of culpability, wanton behavior falls between mere negligence and willful misconduct, Ceretti v. Flint Hills Rural Elec. Coop. Ass'n, 837 P.2d 330, 346 (Kan. 1992), and is found when the wrongdoer realizes the imminence of danger and recklessly disregards or is indifferent to the consequences. Id. We reverse only if no reasonable jury could have found upon the record as a whole that TIC acted wantonly. See Acrey v. American Sheep Indus. Ass'n, 981 F.2d 1569, 1575 (10th Cir. 1992).

Many of the same facts supporting the jury's finding that TIC was seventy-six percent at fault also support the jury's conclusion that its behavior reflected a wanton mental state. TIC was aware of a recurring hazard of surprise hydraulic failure in the use of the vertical wing cultivator. It knew that danger was imminent because, in the absence of warnings, operators were being killed and maimed. Yet it chose to do nothing. A reasonable jury could find that TIC's apparent indifference to the safety of Wil-Rich cultivator operators was "wanton" within the meaning of the statute.

III.

Kansas law places a cap of $250,000 on awards for noneconomic loss. Kan. Stat. Ann. § 60-19a02. On cross-appeal, Patton urges this Court to declare this damage cap void, either because it is superseded by § 202 of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132, or because it denies Ryan Patton equal protection of the law as a disabled person. We review these legal questions *de novo.* Northern Natural Gas Co. v. Grounds, 931 F.2d 678, 681 (10th Cir. 1991).

A.

ADA § 202 provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. To the extent feasible, we look to decisions construing the Rehabilitation Act to assist us in

interpreting analogous provisions of the ADA. See Helen L. v. DiDario, 46 F.3d 325, 330 n.7 (3d Cir.), cert. denied, 116 S. Ct. 64 (1995). ADA § 202 is violated when a "qualified individual with a disability" is prevented from participating in or benefiting from a public service, program, or activity, by reason of a qualifying disability, regardless of whether the entity intended to discriminate against the disabled person. See Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1384 (10th Cir. 1981) (showing of discriminatory intent not necessary in Rehabilitation Act action alleging denial of access to public program on basis of disability). The language of the statute also states that a violation occurs when a public entity intentionally discriminates against a qualified disabled person, regardless of whether that discrimination occurs in the context of a public service, program, or activity. Patton asserts both types of violation.

Patton, a paraplegic, is a "qualified individual with a disability" within the meaning of the ADA. See 42 U.S.C. § 12131(2). He alleges that the damage cap amounts to a denial of access to a "service, program or activity" of the State of Kansas by reason of disability. We need express no opinion as to whether a jury determination of noneconomic damages is a state "service, program, or activity" under the ADA because Patton was not denied access to such a determination.

Interpreting the Rehabilitation Act, the Supreme Court has held that a facially neutral governmental restriction does not deny "meaningful access" to the disabled simply because disabled persons are more likely to be affected by it. Alexander v. Choate, 469 U.S. 287, 303-04 (1985) (holding that a ceiling on the number of inpatient hospital days paid for by Tennessee's Medicaid program did not deny the disabled meaningful access to Medicaid services). Even if the burden of the noneconomic damage cap falls disproportionately on the disabled, Alexander requires only that Patton have the same access to a jury determination of damages as everyone else.

Id. at 303-05. He did. Because the damages limitation applies to all victorious plaintiffs, Patton was not denied access to a jury determination of damages by reason of disability.

Because ADA § 202 prohibits both the denial of access to state services "by reason of disability" and intentional discrimination, the Kansas damage cap may still be invalidated if plaintiffs can demonstrate that it was motivated by discriminatory animus. A state action so motivated does not pass muster under the ADA simply because some non-disabled persons might also be adversely affected by it. We conclude that plaintiffs have presented no evidence of an intent to discriminate.

In support of the intentional discrimination allegation, plaintiffs focus on the following statement of the Kansas Supreme Court regarding the noneconomic damage cap:

> Denying those with the greatest pain and suffering a full remedy in order to ease insurance rates for those who cause injury was considered and approved by a majority of the legislature. The legislature is aware that the cap on noneconomic damages will affect the right to recover by those most severely injured in Kansas.

Samsel v. Wheeler Transp. Serv., Inc., 789 P.2d 541, 558 (Kan. 1990) (citation omitted).

Samsel does not hold that the state legislature intended to discriminate against persons with disabilities when it passed Kan. Stat. Ann. § 60-19a02. The Kansas legislature was concerned with keeping insurance affordable so that plaintiffs, including the disabled, would be able to find a solvent pocket from which to recover. See id. at 544 (no matter how favorably written to plaintiffs, tort laws cannot secure justice unless deserved compensation is actually paid). The Kansas legislature was concerned with the effect on insurance rates of

highly unpredictable noneconomic damage awards. Id. at 552-53. By defining what it considered a sufficient award for noneconomic damages, the Kansas legislature meant to protect defendants from overly sympathetic judges and juries while at the same time protecting plaintiffs from judges who might otherwise reduce awards to less than $250,000. Id. at 557. The Kansas legislature did not intend to discriminate against the disabled as a class. We affirm the district court's conclusion that Kan. Stat. Ann. § 60-19a02 is not superseded by the ADA.

B.

In their equal protection claim, plaintiffs argue that Patton is a member of a suspect class composed of persons with disabilities singled out for unfavorable treatment by the Kansas noneconomic damage cap. Plaintiffs and *amici* suggest that Congress, pursuant to its powers under Section 5 of the Fourteenth Amendment, may designate certain groups as suspect classes for the purpose of equal protection analysis. They further maintain that, in passing the ADA, Congress meant to require courts to apply strict scrutiny to legal classifications based on disability, effectively overruling City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Whether or not this is true, strict scrutiny is inappropriate because Kan. Stat. Ann. § 60-19a02 does not involve a classification based on disability.

As we have already noted, the cap applies to all victorious plaintiffs who seek noneconomic damages. Other circuits have held that damage caps create classifications either of "claimants," see Davis v. Omitowoju, 883 F.2d 1155, 1158 (3d Cir. 1989), or, in a case remarkably similar to the one before us, "victims with noneconomic losses that exceed $250,000." Hoffman v. United States, 767 F.2d 1431, 1435 (9th Cir. 1985). See also Boyd v. Bulala, 877 F.2d 1191,

1196 (4th Cir. 1989). We agree with the Ninth Circuit's formulation of the classification created by noneconomic damage caps.

Because the Kansas law involves no suspect classification, we review this equal protection claim under the rational basis test. Nordlinger v. Hahn, 112 S. Ct. 2326, 2331 (1992). Under this standard, a statute is presumed to be constitutional and must be upheld if it "rationally further[s] a legitimate state interest." Id. at 2331-32. Kan. Stat. Ann. § 60-19a02 is designed to protect litigants from the unrestrained exercise of judicial discretion to limit damage awards, Samsel, 789 P.2d at 557, and to stabilize liability insurance rates, see id. at 544. Its goal is to ensure that successful plaintiffs will actually be able to collect damage awards. See id. When a legislature strikes a balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of "structur[ing] and accommodat[ing] 'the burdens and benefits of economic life.'" Boyd, 877 F.2d at 1196 (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83 (1978) (further quotation omitted)). The state interests sought to be advanced by the damage cap are legitimate. Because the $250,000 cap on noneconomic damages rationally furthers the state's interests, we find that Kan. Stat. Ann. § 60-19a02 does not violate the Equal Protection Clause and therefore uphold the district court's denial of plaintiffs' motion to amend or alter judgment.

CONCLUSION

We have considered the other contentions of the parties and conclude that they lack merit. Because find no error that would require reversal, the judgment of the district court is AFFIRMED.

Ryan M. PATTON and Kathy Strunk, Plaintiffs,

v.

TIC UNITED CORPORATION, et al., Defendants.

No. 91-2331-JWL.

United States District Court,
D. Kansas.

July 25, 1994.

In products liability action against company which bought factory which made defective cultivator which caused plaintiff's injuries, the District Court, Lungstrum, J., held that: (1) punitive damages award did not violate defendant's due process rights, and (2) $1,000,000 punitive damages award was appropriate based on consideration of statutory factors.

So ordered.

1. Constitutional Law 303
Damages 91(1)

Submission of punitive damage question to jury did not violate due process rights of company which bought factory that made defective cultivator which caused injury approximately three years later based on company's failure to give postsale warning; extension of postsale duty to warn was a logical extension of general common law of Kansas, which had long required manufacturer to exercise reasonable care, to

specific factual situation not previously considered by Kansas Supreme Court. U.S.C.A. Const. Amends. 5, 14.

2. Damages .94

Punitive damages award of $1,000,000 against company which bought factory that made defective cultivator was warranted by consideration of statutory factors; factors weighing against defendant were likelihood at time of misconduct that failure to warn would result in serious harm, company's failure to make effort to sufficiently evaluate matter of postsale warning and to make reasoned determination as to whether warning program could be effective and should be implemented, attitude and conduct of company upon discovery of misconduct, and company's financial solvency. K.S.A. 60-3702.

James A. Patton, Patton Law Office, Hiawatha, KS, Robin G. Maxon, Topeka, KS, Gary D. McCallister, Chicago, IL, for Kathy Patton Strunk.

James A. Patton, Patton Law Office, Hiawatha, KS, Jerry R. Palmer, Palmer & Lowry, Topeka, KS, Gary D. McCallister, Chicago, IL, for Ryan M. Patton.

Curtis L. Tideman, Lathrop & Norquist, Gregory L. Musil, William V. North, Shughart, Thomson & Kilroy, Overland Park, KS, Daniel M. Dibble, Lathrop & Norquist, Kansas City, MO, Thomas A. Sheehan, R. Lawrence Ward, Mark A. Olthoff, Dennis D. Palmer, Philip W. Bledsoe, Shughart, Thomson & Kilroy, Kansas City, MO, for Lear Siegler Inc., Lear Siegler Diversified Holdings Corp.

Curtis L. Tideman, Lathrop & Norquist, Overland Park, KS, Daniel M. Dibble, Lathrop & Norquist, Jennifer H. McCoy, Brian J. Madden, Lathrop & Norquist, Kansas City, MO, for Hutchinson Wil-Rich Mfg. Co.

Daniel M. Dibble, Lathrop & Norquist, Kansas City, MO, for TIC United Corp., a Delaware corporation.

Gregory L. Musil, William V. North, Shughart, Thomson & Kilroy, Overland Park, KS, Thomas A. Sheehan, R. Lawrence Ward, Mark A. Olthoff, Dennis D. Palmer, Shughart, Thomson & Kilroy, Kansas City, MO, for Rapistan Corp., LS Acquisition Corp., No. 27, LSDHC Corp., LS Acquisition Corp. No. 50, LS Acquisition Corp. No. 6.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

I. Introduction

On May 17, 1994, a jury returned its verdict in this product liability action assessing 76 percent of the fault for plaintiff Ryan Patton's serious injuries to defendant TIC United Corporation ("TIC") because of its breach of the duty to provide a post-sale warning. The jury also awarded damages, which led this court, following the application of Kansas' comparative fault statute and K.S.A. 60-19a02(b), to enter judgment in favor of the plaintiffs against TIC in the amount of $998,735.61. The jury also provided on its verdict form that TIC acted in a wanton manner, thereby entitling plaintiffs to punitive damages under K.S.A. 60-3702.

On July 20, 1994, following the receipt of written submissions, the court conducted a separate proceeding regarding the punitive damage issue as provided for in K.S.A.

60-3702. At the hearing, the parties introduced evidence regarding the proper amount of punitive damages to be awarded. Additionally, the court issued it rulings on several post-trial motions.[1]

Having considered the evidence, the papers filed by the parties and their oral arguments, the court is now prepared to issue its ruling on the due process argument contained in TIC's Rule 50 motion (Doc. # 291) and concerning the amount to be awarded as punitive damages in the case. For the reasons set forth below, TIC's due process argument is denied and the court hereby enters judgment for plaintiffs against TIC for punitive damages in the amount of $1,000,000.00.

II. Discussion

A. TIC's Due Process Argument

[1] TIC argues that the court's submission of the punitive damage question to the jury was violative of its due process rights and public policy, and thus erroneous, because prior Kansas law gave no notice to TIC that its conduct in not giving a post-sale warning could be the basis for an award of punitive damages. TIC bought the factory that made the defective cultivator in August of 1987. Ryan Patton's accident occurred in April of 1990. TIC argues that it was not until the Kansas Supreme Court's decision in *Patton v. Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1299 (1993), which

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[1] Plaintiffs' motion to alter or amend the judgment (Doc. # 297) was denied in its entirety. Defendant TIC's motion for judgment pursuant to Rule 50 of the Federal Rules of Civil Procedure or, in the alternative, for new trial (Doc # 291) was denied in its entirety except for TIC's argument that the imposition of punitive damages in this case would violate its due process rights, which was taken under advisement by the court.

was filed on October 29, 1993, that there was a judicially created post-sale duty to warn in Kansas and, therefore, TIC had no notice prior to that date that it could be liable in any manner for punitive damages based on a theory of its breach of a post-sale duty to warn. TIC argues that due process requirements are not satisfied if punitive damages are imposed based on a rule of law created after the occurrence of the conduct which gives rise to the punitive damages claim.

In support of its argument, TIC relies primarily on *TXO Production Corp. v. Alliance Resources Corp.*, — U.S. —, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). *TXO* involved a common-law action for slander of title in the state of West Virginia in which respondents obtained a judgment against petitioner for $19,000.00 in actual damages and $10 million in punitive damages. The Supreme Court granted certiorari to decide whether that punitive damages award violated the Due Process Clause of the Fourteenth Amendment, either because the amount was excessive or because it was the product of an unfair procedure. Throughout the majority of its opinion, the *TXO* court discusses petitioner's argument that a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—was so excessive that it must be deemed an arbitrary deprivation of property without due process of law. The court rejected this argument. *Id.* at —, 113 S.Ct. at 2722-23. Following this analysis, the court, in the last paragraph of its opinion, summarily disposed of respondent's argument that the procedure followed in the case to award punitive damages "was unconstitutionally vague" because it "had no notice of the possibility that the award of punitive damages might be divorced from an award of compensatory damages." *Id.* at —, 113 S.Ct. at 2724. The court stated that:

> In *Wells v. Smith*, 171 W.Va. 97, 105, 297 S.E.2d 872, 880 (1982), the West Virginia Supreme Court of Appeals held that a defendant could be liable for punitive damages even

> if the jury did not award the plaintiff *any* compensatory damages. In any event, the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct. Prior law, in West Virginia and elsewhere, unquestionably did so.

Id.

Defendant also cites three state court opinions in support of its argument that the imposition of punitive damages in this case would violate its due process rights or would, at least, be unfair and contrary to public policy. Those cases are *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (N.M.App.1983); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (Ill.1979); and *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). Each of those cases involved a situation in which an employer had terminated an employee in reliance on long-standing terminable-at-will rules. Prior to the cases in question, the law in each of the three states had been that an employer could discharge an employee for any reason without incurring liability. In each of the three cases, the court reversed the prior terminable-at-will rules and found the employer liable for discharge of the employee based on public policy grounds. However, each of the courts denied any award of punitive damages on the grounds that it would be unfair to punish defendants for conduct which they could not have determined beforehand was even actionable. The Kansas Court of Appeals reached a similar conclusion in *Murphy v. City of Topeka*, 6 Kan.App.2d 488, 630 P.2d 186 (1981).

TIC contends that the holdings of these state court cases, when analyzed in light of the Supreme Court's statement in *TXO*, virtually leads to a constitutional rule that a newly created duty, such as defendant contends is present in this case, cannot give rise to a claim for punitive damages. Defendant contends that the proper test is whether prior law fairly apprises an actor that the actor's conduct may lead to a

punitive damages award against it. Defendant argues that, in this case, there was no prior law that gave any hint that its failure to issue a postsale warning might warrant the imposition of punitive damages. Thus, defendant contends that imposition of punitive damages in this case would run afoul of the constitutional mandate of *TXO*, or at least would be so contrary to the public policy considerations enunciated in the state court cases that Kansas would decline to do so.

In response to defendant's argument, plaintiffs cite the Tenth Circuit case of *Southwest Forest Industries, Inc. v. Sutton*, 868 F.2d 352 (10th Cir.1989). In *Southwest Industries*, the court held that punitive damages could be awarded for the retaliatory discharge of employees covered by collective bargaining agreements, even though the Kansas appellate court's opinion extending the cause of action to such persons was handed down during the pendency of the litigation. The court held that the presence of the prior Kansas Court of Appeals decision in *Murphy* recognizing the cause of action with respect to non-union employees had given the defendant ample notice of the potential for an award of punitive damages. *Id.* at 356. Thus, even though no Kansas court had spoken directly to the issue of whether employees covered by collective bargaining agreements could bring a retaliatory discharge action at the time of defendant's conduct, the Tenth Circuit held that punitive damages could properly be imposed.

Plaintiffs argue that, like the situation in *Southwest Industries*, in the present case there was a line of authority in Kansas that gave notice to defendant that post-sale duties did exist under Kansas law, and that such a duty could be extended to defendant under the facts of this case. *See Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert denied* 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984); *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987); *Stratton v. Garvey Intern.*,

Inc., 9 Kan.App.2d 254, 676 P.2d 1290 (1984). Plaintiffs further point out that defendant conducts business in many states, some of which had explicitly recognized a post-sale duty to warn under circumstances similar to those present in this case well before Ryan Patton was injured. *See, e.g., Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn.1988), *cert. denied* 492 U.S. 926, 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989). Thus, plaintiffs argue prior Kansas law and the law of other jurisdictions gave TIC sufficient notice that its failure to issue a postsale warning might warrant the imposition of both compensatory and punitive damages.

The court finds that the imposition of punitive damages in this case does not violate defendant's right to due process nor is it unfair. Although a closer case, perhaps, the court finds the situation here to be analogous to that in *Southwest Industries*. As was the case in *Southwest Industries*, the court believes that previous Kansas decisions were sufficient to give defendant fair notice of the potential for an award of punitive damages.[2] The court finds the retaliatory discharge decisions cited by defendant to be distinguishable from the present case. Those cases all involved situations in which the general as well as the specific conduct for which the defendants were found liable had been legal up until the judgments in those cases, and they represented a clear reversal of existing law. Such is not the case in this action. The extension of a post-sale duty to warn to manufacturers in the position of defendant in this case did not in any manner constitute a *reversal* of Kansas law. Rather, it was a logical extension of the general common law of Kansas, which had long required a manufacturer to exercise reasonable care, to a specific factual situation which had not

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[2] The court would be hesitant to rely on the fact that other relevant jurisdictions recognized the post sale duty before 1990 to evaluate defendant's conduct in Kansas. At the least, however, it does reflect on defendant's attitude and is pertinent to the analysis in the next section.

previously been considered by the Kansas Supreme Court. That is sufficiently similar to the situation in *Southwest Industries*, which upheld punitive damages although there had been no prior Kansas case proscribing the specific conduct involved.[3]

The court believes that the trend in prior law in Kansas, as in other jurisdictions, should have fairly indicated to defendant that Kansas would recognize a post-sale duty to warn, the "egregious" breach of which might result in a punitive damages award.[4] Accordingly, although the court concedes that this is an issue on which reasonable minds could well differ, the court holds that the principles of fundamental fairness and of notice, as required by the due process clause, are satisfied and the jury's finding of entitlement to punitive damages should be upheld.

B. Punitive Damages

[2] At the post-trial hearing held on July 20, 1993, in accordance with K.S.A. 60-3702, the court heard evidence from the parties regarding the amount of punitive damages that should be awarded. This evidence included testimony from several of defendant's corporate officials, an accountant retained by plaintiffs to testify regarding defendant's financial condition, and testimony from plaintiff Ryan Patton. After

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[3] The defendant argues that because *Southwest Industries* was decided before *TXO* its precedential value is lacking in the face of a constitutional challenge. However, *TXO* is far from clear in its pronouncement and this court is not convinced that *TXO* truly establishes, or even presages, a more stringent test than *Southwest Industries* used.

[4] Here, the jury's finding of "wantonness" certainly satisfies TXO's "egregious" conduct standard. It means that the jury was convinced that the defendant realized the imminence of danger and showed complete indifference or reckless disregard for it. The evidence in the case supports that finding.

carefully considering the evidence presented at the hearing and the arguments of the parties, the court is now prepared to determine the amount of punitive damages to be awarded.

The court will analyze the seven factors listed in K.S.A. 60-3702(b). As the plaintiffs note (and the defendant does not dispute) those seven factors, listed below, are also not exclusive. *Fenstermacher v. Telelect,* 1992 WL 100312 (D.Kan.), April 22, 1992.[5] Thus, the court has taken into consideration all of the evidence presented during the trial of this matter as well as the evidence introduced at the punitive damages hearing in arriving at its decision.[6]

1. Likelihood at the time of misconduct that serious harm would arise from the defendant's misconduct

The misconduct at issue here is defendant's failure to give a post-sale warning regarding hazards related to its cultivators following its receipt of information that a number of serious accidents had occurred. Obviously, once defendant received information regarding these accidents, it was clear to defendant that serious harm (including death) was occurring as a result of the design of the cultivator. The question, then, is what serious harm was likely to occur in the future due to

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[5] The court here specifically takes into account in its decision the forty percent contingent fee contract between plaintiffs and their attorneys and the approximately $100,000.00 in litigation expenses incurred.

[6] The plaintiff suggests that the court consider the reasonableness of a multiplier of actual damages such as they have drawn from the awards in other punitive damage cases. The court notes, in that regard, that in *Fenstermacher* the punitive award was approximately one-half the actual damages while in *Weathers v. American Family Mut. Ins. Co.,* 793 F.Supp. 1002 (D.Kan.1992), another case involving a punitive damages award by Judge O'Connor, the ratio was very similar to the one which results here in this case.

defendant's failure to give a post-sale warning? The court finds the answer to this question problematical.

Defendant argues that a warning would not have been effective since the defective cultivators would still be in the field and users, whose habits were ingrained, would continue to operate the cultivators in the same manner and serious injuries would continue to occur at the same rate. Plaintiffs, on the other hand, argue that if a specific warning program had been implemented by defendant, it would have heightened the sensitivity of cultivator users to the dangers inherent in the cultivator and caused them to modify their behavior. For example, since the accidents occurred when users pulled the lock pin under the mistaken impression that the cylinder was providing hydraulic pressure, and one of the common situations where a lack of hydraulic pressure would result was during the changing of a cylinder, a specific warning relating the dangers and instructing users to always keep the cultivator wings down when changing the hydraulic cylinder could very well have been effective in preventing injuries.

The court believes that the *main* cause of the accidents was the defective design of the cultivator. However, the court also believes that even if it would not have had a *certain* preventative effect, an aggressive post-sale warning program by TIC *could* have reduced the likelihood of harm. The jury, moreover, did find that the failure to warn was the predominate cause of the harm suffered by these plaintiffs. On balance, this factor weighs against the defendant to a significant degree, albeit less so than if the efficacy of a post-sale warning program were more clear.

2. Degree of the defendant's awareness of that likelihood

As discussed above, defendant contends that it did not believe a post-sale warning would be effective in preventing injuries from occurring. Defendant's key employee for this

product, John Kehrwald, testified that he rejected any post-sale warning because he did not believe it would have any effect based on his experience with users of farm machinery. He also testified that he spoke with a representative of John Deere, which had engaged in a warning and retrofit with regard to similar cultivators it had produced, and that representative had told him that their program had been a disappointment. Thus, Mr. Kehrwald believed he was justified in concluding that a post-sale warning would not prevent injuries from occurring.

Even if the utility of a post-sale warning program is a matter for reasonable dispute, the court is especially disturbed by the lack of effort made by defendant to sufficiently evaluate the matter in order to make a reasoned determination as to whether any sort of warning program could, in fact, be effective and should be implemented. Deere was reacting to the dangers of its similar cultivators by aggressively issuing warnings through letters, trade publications and even a retrofit program through its dealer network (which exceeded any duty defendant had here). While the court does not believe the mere fact that Deere had engaged in that type of program meant that defendant was required to, the court does believe that defendant should have done more to attempt to evaluate the effectiveness of Deere's campaign, or of one which it might develop, rather than merely to rely on Mr. Kehrwald's alleged fleeting conversation with the Deere representative. Frankly, the evidence presented by defendant that a warning program was seriously considered or was reasonably rejected based on any degree of engineering or scientific analysis is very thin. This is the most damning of the factors here.

3. Profitability of the defendant's misconduct

The court finds this factor negligible. The testimony at the hearing was that it would only cost approximately

$110,000.00 to implement a warning program. Also, the court is not convinced that defendant's failure to warn has had much effect one way or the other on defendant's sales of cultivators. Thus, the court does not weigh this factor against the defendant as it would if the failure to warn had been highly rewarding.

4. Duration of the conduct and any intentional concealment of it

This factor also does not weigh heavily in the court's determination. The jury did find that, for purposes of determining whether the useful safe life of the cultivator had expired under Kansas law, defendant had fraudulently concealed the defect in the cultivator. However, the court believes this result almost to have been mandated as a matter of logic under the facts of this case by the failure of the defendant to warn of the danger associated with the cultivator. The court does not equate the jury's finding of fraudulent concealment on the safe-life issue with intentional concealment by defendant of the conduct for which punitive damages arise, that is its failure to issue a post-sale warning. There is no evidence that defendant concealed its failure to issue a warning, it simply chose not to give any.

5. Attitude and conduct of defendant upon discovery of the misconduct

Defendant made absolutely no effort to engage in any type of post-sale warning program regarding the cultivators until the verdict had been rendered by the jury in this case. Such a delay in action seems consistent to the court with defendant's general position in this case. Defendant, at least in this area, has shown absolutely no inclination willingly to take any safety initiatives with regard to users of their cultivators similarly

situated to those who have been injured. The court, of course, finds it preferable that defendant has, at last, generated a program rather than resolutely ignoring all that has transpired. Yet, the salutary effect is significantly watered down by the timing.

6. Financial condition of defendant

The court finds from the testimony at the hearing that defendant is financially solvent and operating profitably.[7] Pursuant to K.S.A. 60-3702(e), the punitive damage award cannot exceed $5,000,000.00.

The question of how much of an award must actually be made in order to punish a defendant in this company's financial position is a more difficult call. Nonetheless, the court feels comfortable that the amount awarded here will hurt, but without producing untoward secondary effects.

7. Total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct

The only damages incurred by defendant to date for its failure to warn are the compensatory damages awarded by the jury to plaintiffs. Those damages were, however, substantial.

8. Summary

In returning its verdict, the jury determined that the plaintiffs had proven, by clear and convincing evidence, that defendant TIC had acted wantonly. The court believes that this finding is supported by the evidence and agrees with the

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[7] The defendant's most recent financial information offered in evidence at trial showed net profit for the year 1993 of over $10 million and a net worth of over $48 million. The evidence also indicated that the defendant is highly leveraged and its assets substantially encumbered.

jury that TIC acted in a wanton manner by failing even to attempt to warn of the hazard associated with its cultivators. In fact, the court questions whether the defendant even seriously considered the matter.

Taking into account the evidence introduced at trial and at the punitive damages hearing, the court hereby assesses punitive damages in the amount of $1,000,000.00. All in all, when the totality of appropriate factors is considered, the court believes that this amount represents a significant, and sufficient, award to adequately punish the defendant and to deter it and others from like conduct in the future.

III. Conclusion

IT IS, THEREFORE, BY THE COURT ORDERED THAT defendant's motion for judgment pursuant to Rule 50 (Doc. # 291) is denied.

IT IS FURTHER ORDERED THAT the clerk of the court is directed to enter judgment in favor of plaintiffs in the amount of $1,000,000.00 for punitive damages.

IT IS SO ORDERED.

253 Kan. 741

Ryan M. PATTON and Kathy Patton Strunk, Plaintiffs,

v.

HUTCHINSON WIL-RICH MANUFACTURING COMPANY, et al., Defendants.

No. 68665.

Supreme Court of Kansas.

Oct. 29, 1993.

Person injured by field cultivator brought products liability action against manufacturer in federal court. The United States District Court for the District of Kansas, John W. Lungstrum, J., certified questions of law. The Supreme Court, Six, J., held that: (1) manufacturer has postsale duty to make reasonable effort to warn of newly discovered latent life-threatening hazards of product unforeseeable at time of sale; (2) whether manufacturer has duty to directly warn ultimate consumers or whether warning distributor or retailer is sufficient depends on facts of case; and (3) manufacturer has no postsale duty to retrofit or recall product.

Questions answered.

1. Federal Courts 392

Supreme Court declined, in responding to questions certified to it by United States District Court, to entertain complex inquiries surrounding impact of products liability statute of repose on manufacturer's liability; questions concerning statute were not certified and manufacturer had not pled statute as affirmative defense in federal action. K.S.A. 60-513(b), 60-3203; Rules Civ.Proc., K.S.A. 60-208(c).

2. Limitation of Actions 182(2)

Products liability statute of repose is affirmative defense and must be pled. Rules Civ.Proc., K.S.A. 60-208(c); K.S.A. 60-513(b).

3. Drugs and Narcotics 18

As long as ethical drug manufacturer markets prescription product, it has duty to warn medical profession of dangerous side effects of which it knows, has reason to know, and should know.

4. Products Liability 14

Under negligence theory, duty to warn of dangers of product may be postsale and is not keyed to manufacture or sale of product.

5. Products Liability 14

Under strict liability theory, duty to warn of dangers of product exists only at time product leaves manufacturer's control.

6. Products Liability 14

Under strict liability theory, if product is not rendered unreasonably dangerous by absence of warning when it leaves manufacturer's control, it cannot at some later date become unreasonably dangerous due to lack of warnings.

7. Products Liability 14

Negligence analysis is more appropriate than application of strict liability in postsale duty to warn context; cardinal inquiry is whether manufacturer's conduct was reasonable and reasonableness standard is flexible.

8. Products Liability 1

Purpose of Kansas Products Liability Act (KPLA) is to consolidate all product liability actions, regardless of theory, into one theory of legal liability. K.S.A. 603302(c).

9. Products Liability 14

Kansas Product Liability Act (KPLA) provision governing duty to warn does not limit manufacturer's duty to warn to point of sale, precluding postsale duty to warn. K.S.A. 60-3305.

10. Products Liability 81.1

Purpose of Kansas Product Liability Act (KPLA) excluding evidence of advances in knowledge of manufacturer after sale of product is to codify wide variety of circumstances that may occur under rule that excludes evidence of subsequent remedial measures and encourage manufacturers

to make their products safe as possible, free from fear that remedial measures will be used adversely in later litigation. K.S.A. 60-3307.

11. Products Liability 81.1

Kansas Product Liability Act (KPLA) provision excluding evidence of advances in knowledge of manufacturer after sale of product did not preclude action against field cultivator manufacturer based on postsale duty to warn, notwithstanding manufacturer's contention that evidence necessary to establish such duty would be excluded under that provision; provision is attempt to codify variety of circumstances that may occur under rule that excludes evidence of subsequent remedial measures, and manufacturer had effected no remedial measures between sale of cultivator and accident giving rise to action. K.S.A. 60-3307, 60-3307(a)(1).

12. Products Liability 14

Manufacturer has postsale duty to warn ultimate consumers who purchased product who can be readily identified or traced when defect, which originated at time product was manufactured and was unforeseeable at point of sale, is discovered to present life-threatening hazard.

13. Products Liability 14

Question of whether postsale duty to warn arises in particular case will depend on facts of that case; what is reasonably prudent postsale conduct for one manufacturer and one type of product may not be reasonable for another manufacturer of entirely different type of product.

14. Products Liability 14

Manufacturer is to be given reasonable period of time after postsale discovery of life-threatening hazard presented by product in which to issue any postsale warning that might reasonably be required.

15. Products Liability 14

Manufacturer is not required at time of sale to warn of unforeseeable dangers involving use of its product.

16. Products Liability 14

Imposition of liability upon manufacturer for inadequately warning ultimate consumer who purchased product prior to time manufacturer learned of potential danger of product is dependent upon reasonableness test and manufacturer's actual or constructive knowledge of risk.

17. Products Liability 14

Postsale duty to warn of dangers of product does not exist until actual or constructive knowledge is acquired by manufacturer concerning life-threatening hazard posed by product when it is used for its normally intended purpose.

18. Products Liability 14

Type of notice of problem revealed by product use that will impose postsale duty to warn on manufacturer will be function of degree of danger which problem involves and number of instances reported.

19. Products Liability 14

Nature of postsale warning of dangers of product required of manufacture and where and to whom it should be given will involve case-by-case analysis of factors such as nature of harm that may result from use without notice, likelihood that harm will occur, number of persons affected, economic burden on manufacturer of identifying and contacting current product users, nature of industry, type of product involved, number of units manufactured or sold, and steps taken other that giving notice to correct problem.

20. Products Liability 14

Postsale notice of potential danger of product to all ultimate consumers who purchased product prior to time manufacturer learned of potential danger may be unreasonable, if not impossible, under particular, circumstances; notice to distributor or retail seller may, in some contexts, meet reasonableness standard.

21. Products Liability 87.1

Generally, resolution of issue of reasonableness of manufacturer's postsale duty to warn of danger of product will be one of fact for jury.

22. Products Liability 12

Manufacturer which learns of potential danger incident to use of product after product has been sold does not have duty to retrofit product.

23. Products Liability 12

Manufacturer which learns of potential danger incident to use of product after product has been sold does not have duty to recall product.

24. Products Liability 12

Decision to expand manufacturer's postsale duty beyond implementing reasonable effort to warn of newly discovered latent life-threatening hazards unforeseeable at time point of sale should be left to administrative agencies and legislature.

Syllabus by the Court

1. The United States District Court for the District of Kansas certified the following four questions under the Uniform Certification of Questions of Law Act, K.S.A. 60-3231 *et seq.*:

(a) Whether Kansas products liability law recognizes a continuing duty to warn theory of liability requiring manufacturers who learn of a danger incident to the use of their products after the sale of those products to warn ultimate consumers who purchased the products prior to the time the manufacturers learned of the potential danger through warnings disseminated to the manufacturers' retailers who have continuing contact with the consumers.

(b) Whether Kansas products liability law recognizes a continuing duty to warn theory of liability requiring manufacturers who learn of a danger incident to the use of their products after the sale of those products to directly warn ultimate consumers who purchased the products prior

to the time the manufacturers learned of the potential danger.

(c) Whether Kansas products liability law places a duty to retrofit upon manufacturers who learn of a potential danger incident to the use of their products after the products have been sold.

(d) Whether Kansas products liability law places a duty to recall upon manufacturers who learn of a potential danger incident to the use of their products after the products have been sold.

We hold, under the facts as submitted by the certifying court and supplemented by the record, that the answers as amplified in the opinion are:

(a) A qualified yes.

(b) A qualified yes.

(c) No.

(d) No.

2. A manufacturer has a post-sale duty to warn ultimate consumers who purchased the product who can be readily identified or traced when a defect, which originated at the time the product was manufactured and was unforeseeable at the point of sale, is discovered to present a life threatening hazard.

3. A manufacturer who was unaware of a life-threatening hazard at time the manufacturer's product was sold and has since acquired knowledge of the hazard should not be absolved of all duty to take reasonable steps to warn ultimate consumers who purchased the product. A manufacturer is to be given a reasonable period of time after

discovery of the life-threatening hazard in which to issue any post sale warning that might reasonably be required.

4. A manufacturer is not required at the time of sale to warn of unforeseeable dangers involving the use of the manufacturer's product.

5. The imposition of liability upon a manufacturer for inadequately warning an ultimate consumer who purchased the product prior to the time the manufacturer learned of the potential danger regarding the dangers of the product is dependent upon a reasonableness test and the manufacturer's actual or constructive knowledge of the risk.

6. K.S.A. 60-3305 of the Kansas Products Liability Act, K.S.A. 60-3301 *et seq.*, refers to "any duty on the part of the manufacturer . . . to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product" in "any product liability claim". No statutory limitation or precedential authority limits to the point of sale a manufacturer's duty to warn the ultimate consumer who purchased the product prior to the time the manufacturer learned of the potential danger.

7. A manufacturer's post-sale duty to warn does not exist until either actual or constructive knowledge is acquired by the manufacturer concerning a later life-threatening hazard posed by the manufacturer's product when the product is used for its normally intended purpose.

8. A strict liability theory is not applied to a manufacturer's post-sale duty to warn. The cardinal inquiry is, was the manufacturer's post-sale conduct reasonable? The reasonableness standard is flexible. A negligence analysis is

more appropriate than an application of strict liability in the post-sale context.

9. Generally, resolution of the issue of reasonableness of a post-sale duty to warn will be one of fact for the jury.

10. The nature of a manufacturer's post-sale duty to warn and where and to whom the warning should be given involves a case-by-case analysis.

11. K.S.A.1992 Supp. 60-3307 encourages manufacturers to make their products as safe as possible, free from the fear that remedial measures will be used adversely in later litigation. K.S.A.1992 Supp. 60-3307 prohibits the introduction of post-manufacture remedial measures, except as provided by 60-3307(b) (evidence allowed to impeach a witness after a manufacturer's or seller's express denial of the feasibility of the remedial measure). The operative language of the statute, in the context of the case at bar, is the phrase "if such advancements or changes have been made, learned or placed into common use subsequent to the time the product in issue was . . . sold by the manufacturer." K.S.A. 1992 Supp. 60-3307(a)(1).

12. The decision to expand a manufacturer's post-sale duty beyond implementing reasonable efforts to warn of newly discovered latent life-threatening hazards unforeseeable at the point of sale should be left to administrative agencies and the legislature.

Gary D. McCallister, of Davis, Wright, Unrein, Hummer & McCallister, Topeka, argued the cause, and Anne L. Baker, of the same firm, and James A. Patton, Hiawatha, were with him on the briefs, for plaintiffs.

Daniel M. Dibble, of Lathrop & Norquist, Kansas City, MO, argued the cause, and Brian J. Madden of the same firm, and William G. Howard, of the same firm, Overland Park, were with him on the briefs, for defendants.

Donald Patterson, of Fisher, Patterson, Sayler & Smith, Topeka, was on the brief, for amicus curiae Kansas Product Liability Advisory Council.

Lynn R. Johnson and Bobbie R. Bailey, of Shamberg, Johnson, Bergman & Morris, P.C., Overland Park, were on the brief, for amicus curiae Kansas Trial Lawyers Ass'n.

Kevin M. Reynolds, of Whitfield & Eddy, P.L.C., Des Moines, IA, and Donald C. Bollard, III, of Sherman, Taft, and Bangert, Leawood, were on the brief, for amicus curiae Defense Research Institute, Inc.

Lawton M. Nuss and Donald G. Reinsch, of Clark, Mize & Linville, Chartered, Salina, were on the brief, for amicus curiae Kansas Ass'n of Defense Counsel.

SIX, Justice:

This is a first impression products liability case. Four questions concerning a manufacturer's post-sale duties to warn of danger incident to use of its product have been certified by the United States District Court for the District of Kansas. Our jurisdiction is under K.S.A. 60-3201 (authority to answer certified questions).

The Certified Questions

The four certified questions are:

I. Whether Kansas products liability law recognizes a continuing duty to warn theory of liability requiring manufacturers who learn of a danger incident to the use of their products after the sale of those products to warn ultimate consumers who purchased the products prior to the time the manufacturers learned of the potential danger through warnings disseminated to the manufacturers' retailers who have continuing contact with the consumers.

II. Whether Kansas products liability law recognizes a continuing duty to warn theory of liability requiring manufacturers who learn of a danger incident to the use of their products after the sale of those products to directly warn ultimate consumers who purchased the products prior to the time the manufacturers learned of the potential danger.

III. Whether Kansas products liability law places a duty to retrofit upon manufacturers who learn of a potential danger incident to the use of their products after the products have been sold.

IV. Whether Kansas products liability law places a duty to recall upon manufacturers who learn of a potential danger incident to the use of their products after the products have been sold.

Answers to the Certified Questions

Because of the infinite variety of products marketed in this state, the following answers are inexorably linked to and amplified by the corresponding portions of the opinion.

We answer the four certified questions as follows:

A qualified yes.

A qualified yes.

No.

No.

The federal court memorandum and order certifying the four questions contains the following statement of facts:

Facts

"The case comes before the court pursuant to several product liability claims brought by the plaintiff against the manufacturers and distributors of the Wil-Rich Field Cultivator (the 'cultivator'), which is a piece of heavy farming equipment. Among other claims, the complaint alleges that defendants had a continuing duty to retrofit or recall the cultivator and/or to warn the end user of the cultivator of unreasonably dangerous defects which the defendants discovered to exist in the cultivator after its original sale.

"Plaintiff Ryan Patton's father purchased the cultivator from a Wil-Rich dealer in 1977. The cultivator is 28 feet wide and consists of a main body and two 'wings.' The wings are raised and lowered hydraulically by the use of cylinders attached to each wing and controlled from the cab of the tractor. When fully raised the wings are approximately at a 90 degree angle. When raised, the wings are held up by hydraulic pressure if the cylinders are correctly attached and fully charged. The wings can also be held up by a lock pin which is inserted manually. If the hydraulic cylinders are not properly attached and fully charged, the wing will fall rapidly when the lock pin is removed.

"On April 21, 1990, Ryan Patton was changing a hydraulic wing lift cylinder on the cultivator. The wings were fully raised and pinned up by the lock pin. Patton finished changing the cylinder and proceeded to remove the lock pin on the right wing. He did so by standing directly under the raised right wing of the cultivator and pushing up the wing. This relieved pressure on the lock pin and Patton proceeded to pull it out. When he did so the wing fell on him, causing him serious injury."

Patton's claims as stated by the certifying court are:

> "[D]efendants were subject under Kansas law to a continuing duty to warn plaintiff of dangers discovered by defendants after the date of the sale of the cultivator, and that defendants breached this duty by failing to warn plaintiff of the potentially dangerous condition of the cultivator. Plaintiff also contends that defendants were aware of a retrofit program that had been instituted by John Deere on similarly designed cultivators due to the potential for injuries such as were sustained by Ryan Patton. Plaintiffs contend that Kansas law placed a duty on defendants to recall or retrofit the cultivator once the dangerous condition was discovered, and that defendants breached this duty by failing to implement a program to recall or retrofit the cultivator."

The case is before the federal district court on Hutchinson Wil-Rich Manufacturing Company's (HWR) partial motion for summary judgment. HWR submitted a statement of uncontroverted facts. Patton countered with a statement of additional uncontroverted facts. HWR responded by addressing the factual statements of the parties: "If these 'facts' were presented at a trial, defendants would dispute the truth of many of them. That is not necessary here. To put this motion in a posture to be granted, defendants assume, solely

for purposes of this motion, that all of the material [facts] asserted by plaintiffs are indeed 'facts' and are true."

We also shall assume the truth of the facts advanced by Patton in his response to HWR's partial summary judgment motion. We proceed with our analysis on the basis of the certification order as supplemented by additional uncontroverted and relevant facts gleaned from the record.

Lear Siegler, Inc., an additional defendant, has adopted the arguments advanced by defendant HWR. Other defendants have been named because of an alleged relationship with the original manufacturer. HWR denies successor or other liability on any theory. We assume HWR to be the manufacturer and last seller of the cultivator. The resolution of successor liability and ultimate liability, if any, is the business of the federal district court.

The cultivator received normal scheduled maintenance and numerous replacement parts were purchased from the authorized dealership between 1977 and the date of the accident. The hydraulic cylinders were repaired by the dealership in September 1987. The dealership kept a list of equipment purchased by its customers. HWR has over the years maintained an organized system for the distribution and sale of its products through its authorized dealership network. The network identifies the name of the dealership, the principals involved in the dealership, and their addresses and phone numbers. HWR utilizes territory managers who call on the dealers on a frequent basis. HWR has written dealer sales and service agreements with its dealers throughout the United States.

Several other individuals have been injured in accidents connected with vertical fold cultivator wings manufactured by HWR. These accidents appear to have occurred as early as 1983. HWR was aware of these accidents. Patton admits that prior to 1977, HWR had no notice of accidents involving cultivator wings falling when the mechanical lock pin on the

wing was removed. A secondary safety wing latch which was developed in 1983 by Deere & Company, one of HWR's competitors, was unknown to cultivator manufacturers in 1976. Similarly, the other safety devices which Patton alleges should have been on the cultivator were unknown to the industry in 1976. Deere & Company instituted a mandatory safety improvement program for all vertical fold 90° field cultivators in October 1983. The Deere retrofit program became known to John Kehrwald, Vice President of Engineering and Manufacturing at HWR, at some point four or five years after it was initiated. Kehrwald recognized his company had problems with the cultivator wings in 1983. Kehrwald indicated that he believed it was an acceptable risk to choose not to retrofit the HWR cultivators.

Patton stated that there was no way to know whether the hydraulic cylinders are fully charged. Consequently, he believed that after installing a new cylinder, it was safe to remove the lockpin on the wings without doing anything more.

There are no warning labels or decals on the wings of the cultivator. The instruction manual neither details the method by which a cylinder should be changed nor mentions hazards. Patton did not receive any warning concerning hazards or safety modifications from either the dealership or HWR.

HWR's Suggested Specific Issues

HWR and *amici* Kansas Product Liability Advisory Council, The Defense Research Institute, and Kansas Association of Defense Counsel assert that it is essential for us to respond to additional questions which focus on K.S.A.1992 Supp. 60-513(b) as a statute of repose. HWR and the *amici* contend that Patton's claims have been abolished by the 10-year limitation of 60-513(b).

[1] We decline to entertain the complex inquiries surrounding the impact of K.S.A. 1992 Supp. 60-513(b) on HWR's liability. HWR's suggested additional questions have not been certified.

K.S.A. 60-3203 states:

> "A certification order shall set forth the questions of law to be answered and a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose."

[2] Additionally, HWR has not pled K.S.A.1992 Supp. 60-513(b) as an affirmative defense in the federal suit. Although not included in the affirmative defenses listed in K.S.A.1992 Supp. 60-208(c), the statute is an affirmative defense and must be pled. *Baumann v. Excel Industries, Inc.*, 17 Kan.App.2d 807, 810, 845 P.2d 65, *rev. denied* March 16, 1993. (HWR indicates that when the "stay order" in the instant action is lifted, it will move for summary judgment based on the statute of repose.)

Patton's Contentions

Patton crafts the following argument: *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied* 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984), provides authority for the view that manufacturers have a continuing duty of reasonable care concerning ethical (prescription) drugs. The *Wooderson* duty to warn has been applied to other products as well. See *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 156-57, 747 P.2d 1326 (1987). See also *Stratton v. Garvey Internat'l, Inc.*, 9 Kan.App.2d 254, 258, 676 P.2d 1290 (1984) (discusses negligence or strict liability for failure to warn of a dangerous condition in a

product). The factual circumstances of the particular relationship are determinative, not the single fact of whether the alleged duty arose before or after sale.

The Kansas Products Liability Act (KPLA), K.S.A. 60-3301 *et seq.*, places limitations on a manufacturer's duty to warn. See K.S.A. 60-3305. Patton responds to the contention of amicus Kansas Product Liability Advisory Council that the legislature is the proper forum to create a continuing duty. Patton reasons that the legislature addressed the manufacturer/seller's duty and neither excluded common-law liability nor imposed a time limit on the duty to warn.

Factors recognized by other courts as relevant to the imposition of a post-sale duty to warn are present in the case at bar. In *Comstock v. General Motors Corp.*, 358 Mich. 163, 173-78, 99 N.W.2d 627 (1959), the Michigan Supreme Court focused on the dangerousness of the product, holding that there was a post-sale duty to warn of defects in an automobile braking system. Patton also relies on *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied* 492 U.S. 926, 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989) (alleged defective truck tire rim), and *Cover v. Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378, 461 N.E.2d 864 (Ct.App.1984) (alleged defective throttle spring return in Chevrolet Malibu), which indicate that the post-sale duty to warn is a function of the potential dangerousness of the product.

In the instant action, as in *Wooderson*, the product, although useful and beneficial, posed a potential danger of great harm. Heavy agricultural equipment can rarely be made 100% safe for all foreseeable uses. HWR received feedback concerning injuries caused by the cultivator. HWR marketed its product through an established network, making it relatively easy to notify the retailers and their customers of dangers in the product which were discovered after sale. The

use of agricultural equipment renders farming a dangerous occupation.

Although the duty of a post-sale warning may not be present in all cases, HWR had a duty to transmit a warning to authorized dealers who could then pass the message on to consumers. Alternatively, providing notice directly to product owners better insures that those in need of protection will actually receive the information.

Patton is not claiming that the cultivator was not defective when it left HWR's hands and later became defective. Rather, it is Patton's position that the cultivator was dangerous when manufactured. If HWR knew or should have known of the danger at that time, it would have had an obligation to give a warning either under the doctrine of strict liability or under a negligence theory. If the danger in the product which existed at the time of sale had not become known to HWR prior to Patton's injury, his claims would be restricted to these theories applied solely as of the time of sale. However, because HWR acquired knowledge of the cultivator defect and of the risk of danger after sale, its continuing duty to warn was breached when the warning was not given. Patton is not contending that a manufacturer of a product which is considered safe at the time of manufacture, under then current standards, must later warn prior purchasers when safety standards are upgraded.

Patton applies the Restatement (Second) of Torts § 321 (1964) (duty to act when prior conduct is found to be dangerous) and reasons that HWR sold a cultivator which created an unreasonable risk of causing physical injury. After the sale, HWR acquired knowledge of this risk. It was therefore under a duty to exercise reasonable care to prevent the risk from taking effect.

The duty to recall or retrofit, like the duty to issue a post-sale warning, is encompassed within the continuing duty of reasonable care identified in *Wooderson* and *GAF Corp.* The

recall/retrofit obligation does not create a new duty to upgrade products to current state of the art. Consequently, the focus of the recall or retrofit cases is on the correction of the defect which existed at the time the product was sold. Recall or retrofit is a means by which a manufacturer can fulfill the continuing duty of reasonable care.

Patton concedes that no Kansas cases directly address the duty to retrofit a dangerous product. The facts of the case at bar demonstrate that (1) the danger of personal injury and death to users of the HWR cultivator was significant; (2) HWR had notice of the danger; (3) HWR knew of the existence of a simple safety device which could have been installed to protect people who used the cultivator; and (4) the cost to HWR of making the safety package available would not have been significant. In addition to statutory recall obligations, the common law also recognizes retrofit as a means of providing consumer safety.

HWR's Contentions

The following contentions are advanced by HWR: There is no duty to recall or retrofit the cultivator. If a product is not defective when it is first sold, it does not thereafter become defective by reason of technological improvements or other knowledge gained by the manufacturer. Foreseeability is the litmus test of whether a manufacturer is liable for a product that is defective when it is first sold. *Robbins v. Alberto-Culver Co.*, 210 Kan. 147, 152, 499 P.2d 1080 (1972) (manufacture of dandruff control product allegedly breached implied warranty of fitness). Our decisions are consistent, with foreseeability being the guide for determining liability. *Garst v. General Motors Corp.*, 207 Kan. 2, 20-21, 484 P.2d 47 (1971) (All courts agree a manufacturer is not obligated to adopt features which represent the ultimate in safety or design. One of the most significant factors to be considered is whether

others in the field are using the same or a safer design.); *Evangelist v. Bellern Research Corp.*, 199 Kan. 638, 646, 433 P.2d 380 (1967) (The plaintiff must show the product was defective at the time it left the manufacturer's control.); *Jacobson v. Ford Motor Co.*, 199 Kan. 64, 67, 427 P.2d 621 (1967) (No matter what theory of liability is applied, a plaintiff must show the product was defective to recover.).

In *Siruta v. Hesston Corp.*, 232 Kan. 654, 659 P.2d 799 (1983), we held that the cross-examination of defendant's expert regarding design safety changes made in later models of a hay baler was proper. The cross-examination on design safety changes was permitted, not to prove negligence or defect, but to prove feasibility of plaintiff's proposed guard. 232 Kan. at 667, 659 P.2d 799. *Siruta* stands for the proposition that whatever has happened in product design since a machine was first sold is neither relevant nor admissible to prove negligence. Patton seeks to prove the existence of cultivator accidents and the development of product safety devices, all after 1976, for the purpose of establishing HWR's culpability. *Siruta* blocks the admission of such evidence.

K.S.A.1992 Supp. 60-3307 prohibits the admission: (1) of subsequent product improvements, and (2) "for any purpose," not only product design improvements but also later acquired knowledge as to warnings and hazards. The K.S.A.1992 Supp. 60-3307 operative event is the date when the product was first designed or sold; consequently, what might occur thereafter can have no bearing on the issue of an alleged defect in the product. If it is impermissible to introduce the evidence described in the statute for any purpose, Patton is barred from presenting the evidence he plans to use to create post-sale duties. HWR has never denied the feasibility of warning decals or design changes. Therefore, Patton's proffered evidence is not admissible.

K.S.A. 60-451 (evidence of subsequent remedial measures is inadmissible) supports the view that the legislature intended

that product defects be judged at the time when the product leaves the manufacturer's control. K.S.A.1992 Supp. 60-513(b) creates a statute of repose which runs from the last act giving rise to the cause of action. All other sections of the KPLA establish the date of manufacture or sale as the controlling measuring point. The KPLA expresses the intent of the legislature to have any liability for a defective product fixed when the product "goes out the door" for the first time.

Wooderson is distinguishable from the case at bar for two reasons: (1) *Wooderson* pre-dates 60-513(b) and our opinion in *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 831 P.2d 958 (1992); and (2) *Wooderson* should be narrowly applied to the facts peculiar to the manufacture and distribution of ethical drugs.

Jones v. Hittle Service, Inc., 219 Kan. 627, 549 P.2d 1383 (1976), does not support the existence of a continuing duty to warn. HWR concedes *Jones* recognizes that a duty to warn exists, but only as to product defects which may reasonably be foreseen at the time of first sale. 219 Kan. 627, 549 P.2d 1383, Syl. ¶ 4. The issue of notice of defects to past buyers was not before the court in *GAF Corp.*, and consequently the opinion does not establish a post-sale duty to warn.

We have the power to create new causes of action. However, in the case at bar, the creation of new duties may deprive HWR of a vested property right without due process of law, *i.e.*, HWR's defense under K.S.A.1992 Supp. 60-513(b). Three of our 1992 decisions dealing with 60-513(b) (*Dobson v. Larkin Homes, Inc.*, 251 Kan. 50, 832 P.2d 345 [1992]; *Admire Bank & Trust v. City of Emporia*, 250 Kan. 688, 829 P.2d 578 [1992]; and Harding, 250 Kan. 655, 831 P.2d 958) abolish Patton's post-sale continuing duty claims.

Well-made farm implements last a long time. Durability would be perceived by manufacturers as a negative factor if manufacturers were subjected to post-sale duties. The rule of law Patton seeks to have us adopt will stifle technology and

suppress product safety improvement. Under Patton's scenario, a manufacturer would be far safer to design a machine intended to wear out in a few years. Replacement would be required more often, and more machines, albeit inferior ones, would be sold. Pride of product design and improvement would become secondary to fear of liability. Farmers and implement manufacturers would both be losers. The preceding rationale was expressed in *Lynch v. McStome & Lincoln Plaza,* 378 Pa.Super. 430, 440-42, 548 A.2d 1276 (1988) (allegedly defective escalator), in refusing to impose a duty to retrofit.

The legislature, in the KPLA, has clearly declared the public policy of the State. The policy is to limit the rights of plaintiffs to recover in product liability suits generally and to judge a product for an alleged defect only when it is first sold.

Discussion

The Post-Sale Duty to Warn

[3] In *Wooderson,* we undertook an analysis concerning the duty of a manufacturer of ethical drugs to warn others regarding drug side effects. As long as an ethical drug manufacturer markets a prescription product, it has a duty to warn the medical profession of dangerous side effects of which it knows, has reason to know, or should know. The duty continues as long as the marketing continues. 235 Kan. at 409, 681 P.2d 1038. We relied on and quoted extensively from three cases *(Lindsay v. Ortho Pharmaceutical Corp.,* 637 F.2d 87 [2d Cir.1980]; *Ortho Pharmaceutical v. Chapman,* 180 Ind.App. 33, 388 N.E.2d 541 [1979]; *McEwen v. Ortho Pharmaceutical,* 270 Or. 375, 528 P.2d 522 [1974]), all of which involved ethical drug claims against Ortho Pharmaceutical Corporation, the principal defendant in

Wooderson. 235 Kan. at 400, 402, 405, 681 P.2d 1038. *Wooderson's* rationale is limited to the ethical drug context.

The expert testimony and exhibits in *Wooderson* disclosed that there was an abundance of information in medical journals published prior to the years when Wooderson was taking Ortho-Novum 1/80. The information linked the use of oral contraceptives with hemolytic uremic syndrome, malignant hypertension, and acute renal failure. 235 Kan. at 408-09, 681 P.2d 1038. The abundance of information published prior to the sale to Wooderson presented a fact situation that is different from the case at bar. HWR had no knowledge at the point of sale of any hydraulic cylinder hazard associated with the farm cultivator.

For the differences in the approach taken by federal district court judges in Kansas in referencing *Wooderson* to other products, see *Mason v. Texaco, Inc.*, 741 F.Supp. 1472, 1482 (D.Kan.1990), *aff'd in part and remanded* 948 F.2d 1546 (1991), *cert. denied* — U.S. —, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992) (Plaintiff alleged a failure to warn in a products liability action against benzene manufacturer; the court recognized a continuing duty to warn.); *Blackburn, Inc. v. Harnischfeger Corp.*, 773 F.Supp. 296, 301 (D.Kan.1991) (Crane owner brought negligence and strict liability claims against manufacturer which alleged, among other things, a failure to warn; the court recognized a continuing duty to warn.). But see *Johnson County Com. College v. National Gypsum*, 733 F.Supp. 1413, 1417 (D.Kan.1990) (Plaintiff filed suit on negligence and strict liability theory to recover costs associated with the removal of an asbestos-containing plaster product; the court appeared to decline to extend *Wooderson* beyond the ethical drug context.).

Patton contends that the Court of Appeals recognized a post-sale duty to warn in *Stratton v. Garvey Internat'l, Inc.*, 9 Kan. App.2d 254, 676 P.2d 1290 (1984). However, the opinion addressed the question of the extent of a successor

entity's duty to warn of defects in its predecessor's products. *Stratton* held that a successor corporation has a legal obligation to warn when the successor has both knowledge of the defective condition and a sufficient relationship with the predecessor's customers. 9 Kan.App.2d at 258, 676 P.2d 1290. Stratton failed to meet this two-pronged burden. Consequently, he was unable to demonstrate that the successor corporation had a duty to warn. 9 Kan.App.2d at 261, 676 P.2d 1290.

Patton observes that *GAF Corp.* referenced *Wooderson* in holding that a roofing products manufacturer had a duty to warn or take corrective action rather than continue to ignore recurring defects in its product. 242 Kan. at 156-57, 747 P.2d 1326. HWR argues that *GAF Corp.* only establishes a duty to warn at the time of sale. *GAF Corp.* is a "knowledge prior to sale" case. GAF had experienced problems with its product five years before it submitted the published specifications upon which the architects relied. 242 Kan. at 153-55, 747 P.2d 1326. GAF knew its product was defective for the purpose for which it was designed and manufactured when it was sold; consequently, the case is factually dissimilar from the case at bar. 242 Kan. at 157, 747 P.2d 1326.

The questions certified limit our determination of a continuing duty to warn after sale to an ultimate consumer who purchased the cultivator prior to the time HWR learned of any potential danger. Although the HWR-Patton relationship is distinguishable from those in *Wooderson, GAF Corp.*, and *Stratton,* the three cases do not signal rejection of a post-sale duty to warn.

In considering whether HWR may have a duty to warn of product hazards after the point of sale, we choose the label "postsale" rather than "continuing". The postsale claim is separate from the warning claim asserted with respect to the point of sale. See *Jones v. Hittle Service, Inc.*, 219 Kan. at 634, 549 P.2d 1383 (duty to warn arises only when the

supplier "knows or has reason to know that the chattle is or is likely to be dangerous for the use for which it is supplied"); Restatement (Second) of Torts § 388[a] (1964). A post-sale warning could not be given at the point of sale because a manufacturer would not have knowledge to give it.

A distinction also should be drawn between a negligence claim and a strict liability claim. A basic negligence concept involves a risk-utility analysis in which the risk inherent in a condition or activity is balanced against the utility of the condition or conduct and the burden necessary to eliminate or reduce the risk. See Restatement (Second) of Torts §§ 291-293 (1964).

[4-7] Under a negligence theory, the duty to warn may be post sale and is not keyed to the manufacture or sale of the product. The duty to warn under a theory of strict liability exists only at the time the product leaves the manufacturer's control. This distinction reflects the emphasis in strict liability upon the danger of the product rather than the conduct of a manufacturer, i.e., if a product is not rendered unreasonably dangerous by the absence of warnings when it leaves the manufacturer's control, it cannot at some later date become unreasonably dangerous due to the lack of warnings. *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1045-46 (4th Cir.1983) (alleged defects in lift truck). See Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 11 J.Prod.Liab. 103, 170-71 (1988). A negligence analysis is more appropriate than an application of strict liability in the post-sale context. See Dorr, *Defense of Allegations of Post-Sale Duty to Warn* § 9.02, published in The Trial of a Products Liability Case, Southern Methodist U. Products Liability Institute (1982). In the case at bar, Patton has asserted both negligence and strict liability claims.

A variety of courts have found that a manufacturer does not have a post-sale duty to notify product purchasers or users

of changes in the state of the art concerning the safe use of the product. *Collins v. Hyster Co.*, 174 Ill.App.3d 972, 977, 124 Ill.Dec. 483, 529 N.E.2d 303 (1988), *lv. to app. denied* 124 Ill.2d 554, 129 Ill.Dec. 148, 535 N.E.2d 913 (1989) (forklift products liability case), recognized the duty to warn distinction in the defect at sale and new design improvement contexts: "Certainly the law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products based on increased design or manufacture expertise that was not present at the time the product left its control." *Lynch v. McStome & Lincoln Plaza*, 378 Pa.Super. at 440-42, 548 A.2d 1276, considered a manufacturer's duty to retrofit an escalator with a new braking system or to warn the owners of the new design. The court determined that no such duty existed. See *Syrie v. Knoll Intern.*, 748 F.2d 304, 311-12 (5th Cir.1984) (alleged defective bank teller stool); *Carrizales v. Rheem Mfg. Co., Inc.*, 226 Ill.App.3d 20, 33-35, 168 Ill.Dec. 169, 589 N.E.2d 569 (1991), *lv. to app. denied* 146 Ill.2d 623, 176 Ill.Dec. 794, 602 N.E.2d 448 (1992) (alleged negligence in failing to warn plaintiff that gasoline vapors should not be brought in close contact with gas-fired hot water heater); *Estate of Kimmel v. Clark Equipment Co.*, 773 F.Supp. 828, 831 (W.D.Va.1991) (alleged negligence in design of and failure to warn concerning operation of a forklift).

The state of the art may be altered by the development of a more effective safety device. For business reasons, a manufacturer may seek to bring product improvement to the attention of its past customers, and it should be encouraged to do so in a manner that does not underplay important safety developments. See Allee, *Post-Sale Obligations of Product Manufacturers*, 12 Fordham Urb.L.J. 625, 635 (1984). Patton neither requests nor do we impose a requirement that a manufacturer seek out past customers and notify them of changes in the state of the art.

[8] The KPLA became effective July 1, 1981. The KPLA is based on the Model Uniform Product Liability Act, 44 Fed.Reg. 62,714 *et seq.* (1979). The purpose of the Model Act was to consolidate all product liability actions, regardless of theory into one theory of legal liability. 44 Fed.Reg. 62,720. K.S.A.1992 Supp. 60-3302(c) provides that all legal theories of recovery, *e.g.*, negligence, strict liability, and failure to warn, are to be merged into one legal theory called a "product liability claim."

[9] K.S.A. 60-3304 repeatedly utilizes the phrase "at the time of manufacture". The phrase does not appear in K.S.A. 60-3305. We agree with Patton's reasoning that K.S.A. 60-3305 does not exclude a post-sale duty to warn. The K.S.A. 60-3305 reference is to "any duty on the part of the manufacturer . . . to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product" in "any product liability claim". We find no statutory limitation nor has HWR cited precedential authority limiting a manufacturer's duty to warn to the point of sale. See *Reed v. Ford Motor Co.*, 679 F.Supp. 873, 878-79 (S.D.Ind.1988). The three K.S.A. 60-3305 categories which exclude a duty to warn are: (a) warnings related to precautionary conduct that a reasonable user or consumer would take for protection, (b) precautions that a reasonable user or consumer would have taken, and (c) obvious hazards which a reasonable user or consumer should have known. The period beyond "the time of manufacture" is not an excluded category.

Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959), the seminal case upon which Patton relies, held that a manufacturer's duty to warn of a known latent defect exists not only at the time of sale but also when such a defect becomes known to the manufacturer. The *Comstock* facts presented a situation where the defective

automobile brake was present at the time of manufacture. The Michigan court limited its holding by observing that: (1) the brake hazard became known to General Motors "shortly after" the car had been put on the market, and (2) the defect was *life threatening.* 358 Mich. at 177-78, 99 N.W.2d 627.

The post-sale duty to warn varies among jurisdictions. In *Cover v. Cohen,* 61 N.Y.2d 261, 275, 473 N.Y.S.2d 378, 461 N.E.2d 864 (Ct.App.1984), a duty to warn product users of discovered dangers was imposed. See *Hodder v. Goodyear Tire & Rubber Co.,* 426 N.W.2d 826, 833 (Minn. 1988), *cert. denied* 492 U.S. 926, 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989). In *doCanto v. Ametek, Inc.,* 367 Mass. 776, 784-85, 328 N.E.2d 873 (1975) (alleged defective commercial ironer), the Supreme Court of Massachusetts stated: "When the manufacturer of such a machine learns or should have learned of the risk created by its fault, it has a duty to take reasonable steps to warn at least the purchaser of the risk." See also *Smith v. FMC Corp.,* 754 F.2d 873, 877 (10th Cir.1985) (alleged defective cranes); *Owens-Illinois v. Zenobia,* 325 Md. 420, 446, 601 A.2d 633 (Ct.App.1992) (asbestos strict products liability case); and *Harris v. Int'l. Harvester,* 127 Misc.2d 426, 429-30, 486 N.Y.S.2d 600 (S.Ct.1984) (alleged negligence in connection with design of farm tractor).

Some courts have elected to further limit the scope of the applicable duty to warn to particular contexts. For example, in *Walton v. Avco Corp.,* 530 Pa. 568, 577-78, 610 A.2d 454 (1992) *(Walton II,* a strict liability case) the court imposed on a helicopter manufacturer a duty to warn owners that a defective part had been incorporated into the helicopter. See also *Walton v. Avco Corp.,* 383 Pa.Super. 518, 531-32, 557 A.2d 372 (1989) *(Walton I),* for the lower court's analysis which draws a distinction between household consumer goods and a manufacturer of a unique product such as the helicopter. *Habecker v. Clark Equipment Co.,* 797 F.Supp. 381, 388

(M.D.Pa.1992), applied *Walton I* to a strict products liability action concerning a defect in a forklift and suggested:

> "[W]hile forklifts are not common household goods, they are certainly much more prevalent than helicopters. Nearly any business which has a loading dock or a warehouse has a forklift, and it does not stretch the boundaries of imagination to envision frequent inter-business transfers of this type of equipment. Accordingly, with the *Walton [I]* panel's own warning in mind, this court is not willing to extend that doctrine to common business appliances such as forklifts."

See also *Kozlowski v. John E. Smith's Sons Co.*, 87 Wis.2d 882, 901, 275 N.W.2d 915 (1979) (alleged defective sausage stuffer). The cases which impose a duty to warn in a limited context *(e.g., Walton* and *Kozlowski)* appear to balance cost and practicality considerations.

[10, 11] K.S.A.1992 Supp. 60-3307(a)(1) renders "(e)vidence of any advancements or changes in . . . knowledge . . . or testing knowledge . . . learned . . . subsequent to the time when the product in issue was . . . manufactured or sold by the manufacturer" inadmissible in a products liability case. Legislative hearings on S.B. 668 (K.S.A. 1992 Supp. 60-3307) included a statement from the President of the Senate, Senator Robert V. Talkington, who supported the bill's passage:

> "I encourage the committee to support a bill which would prohibit the admission into evidence, during court proceedings, of information related to normal advancements or changes in knowledge or techniques of production, design theory, and packaging of products.

"Normal product changes are a result of the growth of knowledge and not a desire to 'cover-up' design inadequacies. Passage of this measure would not mean victims of poorly designed products would be unable to seek and achieve compensation for injuries sustained from proper use of such products. What S.B. 668 would do is prevent the mere change of a product or product package being construed in court as an implicit acknowledgement that the 'original' design was defective.

"I urge the committee to support this bill to provide an additional element of fairness in our judicial process and encourage economic development and growth in Kansas." Minutes of Senate Judiciary Committee, March 6, 1986, A-II.

We believe that 60-3307 is an attempt to codify the wide variety of circumstances that may occur under the rule that excludes evidence of subsequent remedial procedures. See *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1410 n. 2 (10th Cir.1988) (farm combine strict product liability case). K.S.A.1992 Supp. 60-3307 encourages manufacturers to make their products as safe as possible, free from the fear that remedial measures will be used adversely in later litigation. See also K.S.A. 60-451 (relating to subsequent remedial conduct). We view 60-3307 as a "state-of-the-art" statute which prohibits the introduction of post manufacture remedial measures, except as provided by 60-3307(b) (evidence allowed to impeach a witness after a manufacturer's or seller's express denial of the feasibility of the remedial measure). See *Siruta v. Hesston Corp.*, 232 Kan. 654, 667, 659 P.2d 799 (1983), for our approval of the admissibility of "feasibility" evidence before the enactment of 60-3307. We consider the following to be the operative language in the context of the case at bar: "if such advancements or changes have been

made, learned or placed into common use subsequent to the time the product in issue was . . . sold by the manufacturer." K.S.A. 1992 Supp. 60-3307(a)(1). As we understand the facts, HWR had effected no remedial measures between the 1976 sale of the cultivator and Patton's 1990 accident. If we were to accept HWR's view of 60-3307, we would endorse a situation where a manufacturer's knowledge of frequently occurring life-threatening post-sale hazards in a product free of known hazard at the point of sale would render evidence of those hazards inadmissible when the manufacturer had made no attempt to warn of the hazard.

[12] We recognize a manufacturer's post-sale duty to warn ultimate consumers who purchased the product who can be readily identified or traced when a defect, which originated at the time the product was manufactured and was unforeseeable at the point of sale, is discovered to present a life threatening hazard. See 3 American Law of Product Liability 3d §§ 32:82, 32:83 (1993); Allee, *Post-Sale Obligations of Product Manufacturers*, 12 Fordham Urb. L.J. at 630 (post-sale duty to warn arises when previously unknown danger becomes known). We agree with the Wisconsin Supreme Court in *Kozlowski* when it observed, after applying a post-sale warning duty to a sausage making machine under a claim of strict liability and negligence:

> "We do not in this decision hold that there is an absolute continuing duty, year after year, for all manufacturers to warn of a new safety device which eliminates potential hazards. A sausage stuffer and the nature of that industry bears no similarity to the realities of manufacturing and marketing household goods such as fans, snowblowers or lawn mowers which have become increasingly hazard proof with each succeeding model. It is beyond reason and good judgment to hold a manufacturer responsible for

a duty of annually warning of safety hazards on household items, mass produced and used in every American home, when the product is 6 to 35 years old and outdated by some 20 newer models equipped with every imaginable safety innovation known in the state of the art. It would place an unreasonable duty upon these manufacturers if they were required to trace the ownership of each unit sold and warn annually of new safety improvements over a 35 year period." 87 Wis.2d at 901, 275 N.W.2d 915.

[13-15] We acknowledge practical problems associated with imposing a post-sale duty to warn. See Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U.L.Rev. 892, 896 (1983). The question of whether such a duty arises in a particular case will depend on the facts of that case. The passage of time from manufacture and initial sale to the discovery of previously unknown hazards may reflect that the product has changed ownership many times. The original purchaser may have moved. The length of product life will vary. What is reasonably prudent post-sale conduct for one manufacturer and one type of product may not be reasonable for another manufacturer of an entirely different type of product. The sale of the farm cultivator was made to Patton's father on a one-time basis 13 years before the injury. What sales records will be available to the manufacturer? Notification by a manufacturer to all prior purchasers of a product may be extremely burdensome, if not impossible. In the case at bar, the manufacturer's retailer has continuing contact with the consumers. We reason that a manufacturer who was unaware of a hazard at the time of sale and has since acquired knowledge of a life-threatening hazard should not be absolved of all duty to take reasonable steps to warn the ultimate consumer who purchased the product; however, the warning of unforeseeable dangers is neither required nor possible at the

time of sale. A manufacturer is to be given a reasonable period of time after discovery of the life-threatening hazard in which to issue any post-sale warning that might reasonably be required.

[16-18] The imposition of liability upon a manufacturer for inadequately warning an ultimate consumer who purchased the product prior to the time the manufacturer learned of the potential danger regarding the dangers of the product is dependent upon a reasonableness test and the manufacturer's actual or constructive knowledge of the risk. *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 287, 718 P.2d 1318 (1986); see *Richter v. Limax Intern., Inc.*, 822 F.Supp. 1519, 1521 (D.Kan.1993) (alleged manufacturer's duty to warn users of mini-trampoline about foreseeable dangers associated with the product's use). A post-sale duty to warn does not exist until either actual or constructive knowledge is acquired by the manufacturer concerning a later life-threatening hazard posed by a product when the product is used for its normally intended purpose. The alleged defect in the cultivator was unknown to HWR when it was initially sold. We do not apply a strict liability theory to the post-sale duty to warn. See *American Cyanamid Co.*, 239 Kan. at 287, 718 P.2d 1318. The cardinal inquiry is, was HWR's postsale conduct reasonable? The reasonableness standard is flexible. See Allee, *Post-Sale Obligations of Product Manufacturers*, 12 Fordham Urb.L.J. at 631. The type of notice of a problem revealed by product use that will impose a post-sale duty to warn will be a function of the degree of danger which the problem involves and the number of instances reported. Whether a prima facie case has been made for the presence of a post-sale duty will depend on the facts of each case. *Cover*, 61 N.Y.2d at 276, 473 N.Y.S.2d 378, 461 N.E.2d 864. Each plaintiff must make an initial showing that the manufacturer acquired knowledge of a defect present but unknown and

unforeseeable at the point of sale and failed to take reasonable action to warn of the defect.

[19, 20] The nature of the post-sale warning and where and to whom it should be given will involve a case-by-case analysis. The analysis shall include but not be limited to the examination of such factors as: (1) the nature of the harm that may result from use without notice, (2) the likelihood that harm will occur (Does future continuing use of the product create a significant risk of serious harm which can be lessened if a post-sale warning is given?), (3) how many persons are affected, (4) the economic burden on the manufacturer of identifying and contacting current product users (Does the manufacturer have an ongoing relationship with the purchaser or other knowledge of the identity of the owner of the product which provides a practical way of providing a post-sale warning?), (5) the nature of the industry, (6) the type of product involved, (7) the number of units manufactured or sold, and (8) steps taken other than giving of notice to correct the problem. See *Cover*, 61 N.Y.2d at 276-77, 473 N.Y.S.2d 378, 461 N.E.2d 864. The facts may indicate that notice to all ultimate consumers who purchased the product prior to the time the manufacturer learned of a potential danger is unreasonable, if not impossible. Notice to the distributor or retail seller may, in certain contexts, meet the reasonableness standard.

The particular facts may reflect that a lack of notice was not unreasonable and that a reasonable manufacturer under the circumstances would have taken no post-sale action. Knowledge and reasonableness, as determinative factors, will provide an incentive to manufacturers to issue warnings if latent product hazards are discovered after the initial sale and a warning under the circumstances would be reasonable. We cannot fashion a "bright line" rule from a farm cultivator case

that applies with interpretative ease to the infinite variety of products that inhabit the marketplace.

[21] Each trial judge will necessarily be required to make a determination as to whether the record presents a fact question as to knowledge and reasonableness whenever a plaintiff's claim of negligent breach of a post-sale duty to warn is alleged. Generally, resolution of the issue of reasonableness, after an initial court determination that the issue is presented, will be one of fact for the jury. The trial judge, in instructing the jury on a post-sale duty to warn, shall utilize the relevant factors referenced herein including the nature and likelihood of the injury posed by the product, the feasibility and expense of issuing a warning, whether the warning would be effective, and whether ultimate consumers who purchased the product can be identified.

Retrofitting and Recall

[22, 23] The answer to certified questions three and four is "no." Patton has provided no statute or case law to support the claim that HWR is subject to a duty to retrofit or recall the cultivator. We reason that product recalls are properly the business of administrative agencies as suggested by the federal statutes that expressly delegate recall authority. Extensive federal recall legislation deals with the post sale obligations of manufacturers of products such as automobiles, consumer products, boats, and medical devices. See Consumer Product Safety Act, 15 U.S.C. § 2064 (1988) (Consumer Product Safety Commission); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1414 (1988) (Secretary of Transportation); The Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263g (1988) (Secretary of Health and Human Services); Safe Medical Devices Act of 1990, 21 U.S.C. § 360h (1988 and Supp.IV, 1992).

The recall issue in Kansas is referenced in *Johnson v. Colt Industries Operating Corp.*, 609 F.Supp. 776, 782 (D.Kan.1985) (Evidence on a duty to recall was introduced; the court did not instruct the jury that the manufacturer had a duty to recall.). Although the *Johnson* opinion does not precisely indicate what post sale duties were recognized for manufacturers, the Tenth Circuit on appeal clarified the fact that the district court's approach did not stand for the existence of a duty to recall or retrofit under Kansas law. See *Johnson v. Colt Industries Operating Corp.*, 797 F.2d 1530, 1532 n. 1 (10th Cir.1986).

[24] Courts deal with the business of individual cases grounded on specific facts. The parties' contentions are developed and placed before us with specific facts in mind. The decision to expand a manufacturer's post sale duty beyond implementing reasonable efforts to warn ultimate consumers who purchased the product of discovered latent life-threatening hazards unforeseeable at the point of sale should be left to administrative agencies and the legislature. See, *e.g.*, *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988) (affirming district court's decision not to impose a duty to retrofit an aerial bucket lift in the absence of a state or federal law requiring the product to be recalled); *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 135 (8th Cir.1985); Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U.L.Rev. at 901. These institutions are better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products.

(2)

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In The

Supreme Court of the United States

October Term, 1995

TIC UNITED CORP.,

Petitioner,

vs.

RYAN M. PATTON, and KATHY PATTON STRUNK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GARY D. MCCALLISTER*
BRENDA L. HEAD
DAVIS, UNREIN, HUMMER & BUCK, L.L.P.
Commerce Bank Building
100 S.E. 9th St., 3rd Floor
P. O. Box 3575
Topeka, Kansas 66601-3575
(913) 354-1100

Counsel for Respondents
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTION AND STATUTES INVOLVED..... 1

CORRECTION OF MISSTATEMENTS IN THE PETITION 1

REASONS FOR DENYING THE WRIT 4

I. THE QUESTION PRESENTED DOES NOT PRESENT A COMPELLING REASON OR BROAD CONSTITUTIONAL ISSUE OF GENERAL SIGNIFICANCE THAT NEEDS TO BE ADDRESSED OR DEVELOPED BY THIS COURT 4

II. PETITIONER WAS REASONABLY AFFORDED NOTICE ITS CONDUCT MIGHT LEAD TO A POST-SALE DUTY TO WARN AND THAT AN AWARD OF PUNITIVE DAMAGES MIGHT BE IMPOSED UNDER KANSAS LAW FOR PETITIONER'S WANTON CONDUCT 6

A. Kansas Law Clearly Recognized A Post-Sale Duty to Warn Prior to This Case ... 10

B. The Court of Appeals Correctly Relied Upon Applicable Precedent to Find Notice and Liability 15

C. The Court of Appeals Correctly Determined that Prior Kansas Law Imposed a Post-Sale Duty to Warn Upon TIC 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697 (1964) 4

Comstock v. Great Lakes Distributing Co., 209 Kan. 306, 496 P.2d 1308 (1972) 17

Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980) 18

Johnson v. American Cyanamid Co., 239 Kan. 279, 718 P.2d 1318 (1986) 11

Johnson v. Colt Industries Operating Corp., 797 F.2d 1530 (10th Cir. 1986) 11, 14

Landgraf v. USI Film Prod., ___U.S.___, 114 S.Ct. 1483 (1994) 6

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032 (1991) 4, 16

Patton v. Hutchinson Wil-Rich Manufacturing Company, 253 Kan. 741, 861 P.2d 1299 (1993) ..... *passim*

Patton v. TIC United Corp., 859 F. Supp. 509 (D. Kan. 1994) 16

Southwest Forest Indus., Inc. v. Sutton, 868 F.2d 352 (10th Cir. 1989) 15, 16

Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 35 S.Ct. 886 (1915) 4

State ex rel. Stephan v. GAF Corp., 242 Kan. 152, 747 P.2d 1326 (1987) 11, 13

Stratton v. Garvey Int'l, Inc., 9 Kan. App. 2d 254, 676 P.2d 1290 (1984) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993) 4, 16

Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. Cal., 1992) 5

Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965, 105 S.Ct. 365 (1984) 11, 12, 13

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution 1

Fourteenth Amendment to the United States Constitution 1

STATUTES AND RULES

Kan. Stat. Ann. sec. 60-3307 10

Kan. Stat. Ann. sec. 60-3702 3

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Tenth Circuit reported at 77 F.3d 1235 (10th Cir. 1996). For convenience, Respondents will refer to the opinions of the Tenth Circuit, the United States District for the District of Kansas and the Supreme Court of Kansas by referring to the pages designated in the appendix to Petitioner's brief. (A-1-73) For clarification purposes and identity of the parties, please note the Petitioner herein was the defendant Hutchinson Wil-Rich Manufacturing Company in the Kansas Supreme Court case and a subsequent merger resulted in substitution of the parties.

JURISDICTION AND STATUTES INVOLVED

Jurisdiction is proper for this appeal. Respondents acknowledge the Fifth and Fourteenth Amendments to the United States Constitution are being asserted by the Petitioner.

CORRECTION OF MISSTATEMENTS IN THE PETITION

The Petitioner did not simply "purchase some of the manufacturer's assets and/or assume its obligations and liabilities"; it purchased all of the assets, good will and identity of the product line of Wil-Rich cultivators, retained key personnel from the original manufacturer, in particular John Kehrwald, Vice President of Engineering

and General Manager, who has been employed by all corporate entities involved with this model cultivator, and received financial and other benefits from the extensive and long established dealer organization of Wil-Rich dealers.

The suggestion on page 3 of the Petition that the Kansas Supreme Court on certified questions "announced for the first time" a "post-sale duty to warn" ultimate consumers of a defect that was unforeseen at the time of sale is not an appropriate statement of the process or the holding of that court. This decision, while described by the Supreme Court as a "first impression product liability case" (A-47), noted that while the relationship between the Petitioner and the Respondents was distinguishable from well settled and established cases, those cases *did not* signal "rejection of a post-sale duty to warn." (A-61) The interlocutory Supreme Court decision simply followed an established trend in its decisions to extend duties of reasonable care to the circumstances in this case and discussed the steps a manufacturer must take to locate its customers for product warnings as well as whether there was a recognized post-sale duty to retrofit and recall agricultural equipment. (A-15, A-48)

The Petitioner is uncandid in the way it describes the legal successor liability claims with regard to the various corporate entities that were originally defendants. (*See* Petition at 3, 4) The Petitioner flatly misstates the record and the express findings of the trial court and the Tenth Circuit when it suggests the "*Stratton* theory disappeared" by the end of the trial and that this "product line successor" theory of liability was essentially waived by the Respondents. (*See* Petition at 4) This assertion is

incorrect considering the express rejection of the Petitioner's arguments on this precise point by the Tenth Circuit (A-7), when in fact it is the Petitioner that has been found to have waived its right to complain about the failure to submit *Stratton* issues to the jury. (A-7, 8) The *Stratton v. Garvey Int'l, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290 (1984) theory of liability has been asserted in this case from the beginning to the end. (A-8) The trial court and defense trial counsel knew this, the Tenth Circuit recognized this and this Honorable Court will as well from a reading of all three of the underlying opinions contained in the Petitioner's Appendix.

It is noteworthy the award of the punitive damages in this case was rendered by a trial judge, not a jury, following strict statutory standards and considerations codified in a "tort reform" era statute, K.S.A. 60-3702, adopted by the Kansas legislature which eliminated the right for a jury to award such damages and placing a limitation on the amount of punitive damages that can be recovered. The amount of the punitive damage award was slightly less than the compensatory damages awarded by the jury and paid by the Petitioner. (A-30-36)

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED DOES NOT PRESENT A COMPELLING REASON OR BROAD CONSTITUTIONAL ISSUE OF GENERAL SIGNIFICANCE THAT NEEDS TO BE ADDRESSED OR DEVELOPED BY THIS COURT

Petitioner argues in points I and III the question presented is one of constitutional significance and one which needs further analysis and development by this Honorable Court. This is not the case considering the treatment of the due process requirements by the courts below. The Tenth Circuit, and for that matter, the trial court recognized the fundamental importance of the notice component of the Due Process Clause in the context of passing upon the award of punitive damages in this case. Had this court done otherwise, then Petitioner might have a bonafide argument. The underlying courts did not and the Petitioner does not.

This case involves neither the civil equivalent of an *ex post facto* law or the retroactive imposition of punitive damages as Petitioner argues. The question as presented to this court incorrectly presupposes the non-existence of a duty, diverting the focus away from the real issue of whether due process was violated. This case presents a well reasoned analysis, based upon established precedent from recent and older decisions, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964); and *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S.

482, 35 S.Ct. 886 (1915), that the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damage award might be imposed if egregious conduct occurred. Judge Lungstrum discussed the standards that were applied at the trial level, found "egregious" conduct existed and held this standard was satisfied by the jury's finding of wanton conduct. In fact, the trial court specifically agreed with the jury's finding of wanton conduct. (A-29-30, 32-36)

The Tenth Circuit carefully analyzed the existing authority and proceeded, without difficulty, to fashion a two part test in deciding the Petitioner's due process rights were not violated. The Tenth Circuit made specific factual and legal findings in its analysis and found Petitioner did have sufficient notice that its conduct might be found to be tortious under established Kansas law and Petitioner did have notice punitive damages might be awarded in Kansas for wanton and recklessly indifferent conduct. (A-15-16)

The existing Supreme Court precedent is neither confusing or in need of further development with regard to the importance of the notice element of the Due Process Clause when punitive damages are imposed. This court recently denied the Petition in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. Cal., 1992), *cert. denied*, 506 U.S. 1080, 113 S.Ct. 1047 (1993) which made a similar "lack of notice" due process argument. In *Waits*, the Ninth Circuit, while noting punitive damages are generally unavailable when an issue is one of first impression or where a right has not been clearly established, held the law was clearly established and the defendants consciously disregarded the rights of others by their conduct.

As previously noted by the Tenth Circuit, Petitioner's continued reliance on *Landgraf v. USI Film Prod.*, ___ U.S. ___, 114 S.Ct. 1483 (1994) is misplaced. (A-13) The case at bar does not involve a retroactive imposition of punitive damages, but rather a logical extension of the duty of reasonable care in a product liability post-sale warnings context. The fact the Petitioner regrettably chose to engage in wanton conduct by totally failing to take any corrective action in the face of repeated and unambiguous field service history evidencing similar catastrophic injury and fatality scenarios is what gave rise to what was a most predictable award of punitive damages.

II.

PETITIONER WAS REASONABLY AFFORDED NOTICE ITS CONDUCT MIGHT LEAD TO A POST-SALE DUTY TO WARN AND THAT AN AWARD OF PUNITIVE DAMAGES MIGHT BE IMPOSED UNDER KANSAS LAW FOR PETITIONER'S WANTON CONDUCT

In order to evaluate the arguments presented by the Petitioner in Section II of its Petition, the court needs to be provided with an additional factual summary to see the established trend and clarity of Kansas law on the points about which Petitioner complains. After reviewing the relevant facts and Kansas cases, this court will reasonably come to one of two conclusions: (1) the Petitioner was either guilty of wanton and recklessly indifferent conduct in failing to provide a post-sale warning relative to the latent hazards presented by the cultivator wings falling without warning under circumstances of hydraulic or other mechanical failure which were unknown to the

operator (which was found by the jury, trial court and the Tenth Circuit) or (2) Petitioner was oblivious to what was transpiring in Kansas product liability law while doing business in the state of Kansas as a farm product manufacturer for three years in advance of Ryan Patton's injury.

Petitioner purchased all of the assets, the good will and identity of the Wil-Rich farm equipment division, product line and established dealer distribution organization from Lear Siegler Diversified Holding Corp. in August, 1987. With this acquisition came all of the incidents of this manufacturing operation including individual engineers and decisionmakers that had been originally employed by Wil-Rich, Inc., the original manufacturer and seller of the cultivator in this case in 1977.[1]

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[1] John Kehrwald is the Vice-President of Engineering and General Manager of the Wil-Rich manufacturing facility in Wahpeton, North Dakota. Mr. Kehrwald was originally employed by Wil-Rich, Inc. in 1976. He has been the decisionmaker for all engineering and safety issues including the decision not to issue any post-sale warnings concerning the Wil-Rich ninety degree wing field cultivators since the date the Patton cultivator was first sold; throughout the ownership of the Wahpeton manufacturing facility by all Lear Siegler entities which ended in August, 1987, the date of Ryan Patton's injury, April 21, 1990, and until the present time under Petitioner's ownership which began in August, 1987. Mr. Kehrwald is the one common denominator over time that resulted in the jury and all courts reviewing the facts of this case to find there was a lack of reasonable care and wanton conduct due to Petitioner's failure to take *any* action with regard to post-sale warnings given the considerable adverse field service history actually known to Mr. Kehrwald, other management and the owner of the Petitioner.

Beginning in the mid to late 1980's, field experience involving the Wil-Rich ninety degree wing field cultivator disclosed that repeated and similar catastrophic injuries and fatalities were occurring. These incidents involved unknown or unrecognized hydraulic or mechanical failure in the linkage holding the wing in the ninety degree upright position while it was secured by a lock pin. In order for the operator to remove the wing lock pin to lower the wing before operating the cultivator, the location of the lock pin bracket required the operator to stand directly under the wing. Once the pin was removed in these situations, the wing would fall without warning and either significantly injure or kill the unsuspecting operator who had performed this same routine hundreds of times before without incident. The wing is so heavy and falls so quickly that an operator cannot run or move fast enough once the wing begins to fall to avoid being crushed or impaled by the wing and cultivator shovels. It is the combination of this scenario and the location of the wing lock pin which defines the latent defect in the cultivator that became known *after* the point of sale and which gives rise to the need for the post-sale warning.

Mr. Kehrwald became personally aware of each of the six injury and fatality accidents that occurred before Ryan Patton was rendered paraplegic by such a similar occurrence.[2] Mr. Kehrwald participated in decisions not to

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[2] The other accidents preceding the Patton injury and the date Mr. Kehrwald became aware of them are as follows: Brinkman (9/29/83); Raitz (7/25/86); Langenfeld (9/2/86); Lipetsky (10/86); John (2/11/88); and Sedler (7/19/89). Mr. Kehrwald investigated all occurrences known to the Petitioner.

provide warning labels or instructions on cultivators manufactured and sold in the 1970's and made the decision on behalf of the Petitioner not to provide any post-sale warnings or instructions for cultivators in the field. No corrective actions of any kind occurred until after the jury rendered its verdict in this case finding Petitioner's failure to act as wanton conduct.

Substantial evidence in this case was introduced regarding the existence, function and the day-to-day operation of the extensive Wil-Rich dealer organization. In particular, the Respondents introduced abundant evidence on the particular Wil-Rich dealer that sold and serviced the Patton cultivator since 1977 and about the continual and close contacts between the Wil-Rich manufacturing facility in Wahpeton, North Dakota, the local dealer and their customers including the Pattons. The local dealer knew precisely where the Pattons and their Wil-Rich equipment were located. The local dealer also knew the names, locations and the models of Wil-Rich equipment that was owned and operated by numerous other farmers who testified at trial. The dealer was shown to be able, with relative ease, to contact these individuals with any necessary safety related information.

Who was in a better position under the facts of this case to have warned the innocent users of this equipment if not the Petitioner who acquired and retained the product name identity, the manufacturing facility, the company personnel, the established dealer organization, the ongoing day-to-day operation of its business and the same decisionmakers? The jury and reviewing courts must have asked themselves this same question and arrived at the same conclusion, namely, the Petitioner is

liable for its negligent and wanton conduct and the corresponding compensatory and punitive damage awards.[3]

A.

Petitioner argues the Federal Court's use of the certification process to the Kansas Supreme Court in this diversity product liability action indicates Kansas cases did not recognize a post-sale duty to warn. Therefore, Petitioner argues it was denied sufficient notice that its conduct by doing nothing with regard to product warnings might expose it to liability under Kansas negligence law or to punitive damages if its continued omissions were judged to be wanton or recklessly indifferent under the circumstances. At first blush, this argument appears to have merit. Upon critical analysis, however, and utilizing the actual record in this case as well as the reported decisions which belie the Petitioner's stated position, the argument withers and raises a more troubling question as to good faith advocacy of this position by Petitioner given the underlying record.

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[3] The Kansas Supreme Court also recognized this reality when it discussed the post-sale duty to warn in the context of arguments made by the Petitioner under K.S.A. 60-3307, a statute relating to the inadmissibility of evidence under the Kansas Product Liability Act. The Kansas Supreme Court stated: "If we were to accept Hutchinson Wil-Rich's view of 60-3307, we would endorse a situation where a manufacturer's knowledge of frequently occurring life-threatening, post-sale hazards in a product free of known hazards at the point of sale would render evidence of those hazards inadmissible when the manufacturer has made no attempt to warn of the hazard." (A-68)

The handling of this issue under pre-existing Kansas common law, first by the trial court and later by the Tenth Circuit in affirming the trial court's ruling on the Petitioner's due process argument challenging the punitive damage award, is made simple and compels the denial of this petition.

Kansas courts have decided a number of cases dating back to 1984 that would "fairly indicate" to anyone reading them that post-sale duties to warn existed in Kansas product liability law, albeit these cases involved ethical drugs, roofing materials and handguns. A reading of these same cases, excepting *Stratton*, "fairly indicated" punitive damages might be imposed in response to egregiously tortious conduct. *Johnson v. Colt Industries Operating Corp.*, 797 F.2d 1530 (10th Cir. 1986); *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987); *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986); *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965, 105 S.Ct. 365 (1984) and *Stratton v. Garvey Int'l, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290 (1984).

In *Wooderson*, the Kansas Supreme Court outlined what was required in order to discharge known duties of reasonable care with regard to pre and post-sale warnings to doctors prescribing ethical drugs. *Wooderson*, 235 Kan. at 399-409. Why is this case important in terms of providing notice of potential tort and punitive damage liability? The court found the drug manufacturer to be an expert (one that possesses superior or technical knowledge of the product) because it had the benefit of technical knowledge as well as the scientific and adverse reaction data related to the drugs involved on an ongoing basis.

Isn't this analogous to a farm equipment manufacturer receiving adverse field service history of similar injury and fatality accidents on an ongoing basis while possessing all of the technical knowledge regarding the engineering design of its field cultivator? The drug manufacturer was held to have a "continuous duty" to keep abreast of developments touching upon the manufacturer's product and to notify those affected by adverse reactions discovered from the use of the product. *See Wooderson,* 235 Kan. at 400. While it might be suggested an ethical drug manufacturer is in a different situation with regard to staying abreast of the scientific literature and adverse reactions data due to the regulatory process involving ethical drugs, it does not take a quantum leap to see the predictable outcome of a scenario where the principles of reasonable care transcend different products and industries when critical safety information is known by a manufacturer who is apprised of field service history about its product and it fails to provide this information to those individuals who are exposed to life threatening hazards that are either unknown or unappreciated by them. Obviously, the farm equipment manufacturer, like the drug manufacturer, is in a position of having superior technical and field service knowledge as compared to the dealer and end user. It is, in part, this disparity in perspective and knowledge that initially brought about the "continuing" or "post-sale" duties to exist with regard to the providing of safety information concerning products.

Wooderson also provided a comprehensive review of the state of Kansas law with regard to the types of conduct that might give rise to the imposition of punitive damages in all contexts, not just those involving ethical

drugs. *Wooderson*, 235 Kan. at 415-416. It is not even arguable that Petitioner could read this decision and not come away with a clear understanding that punitive damages might loom on the Kansas horizon upon a total failure to act with regard to providing post-sale warnings concerning critical safety information when numerous users of its product had met with the same catastrophic fate under similar circumstances. The Petitioner knew what was necessary to discharge its responsibilities in this case and regrettably it chose not to act.

If for some reason the Petitioner misunderstood the teachings of *Wooderson*, then it certainly must have become better informed just four months after it acquired the assets of the Wil-Rich Division and began doing business in Kansas in August, 1987. In December, 1987 *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 747 P.2d 1326 (1987) was decided by the Kansas Supreme Court. *GAF* was primarily a fraudulent concealment case involving another type of product and industry, roofing materials. This case is clear as to what might be the result when a manufacturer fails to provide prompt warnings with regard to a product hazard that becomes known to the manufacturer after the product has been put on the market and it is known that repeated failure and causal injury is occurring in the field. The state of the law in Kansas could not have been misunderstood or misinterpreted by any reasonably informed manufacturer. One who might choose to do nothing with regard to providing necessary warnings was on notice it most probably would be subjected to tort liability for its negligence and to punitive damages for its wanton conduct.

Another product liability case in Kansas involving another type of product gave rise to a punitive damage award in the relevant time frame. *Johnson v. Colt Industries Operating Corp.*, 797 F.2d 1530 (10th Cir. 1986). In *Johnson*, a punitive damage award was affirmed by the Tenth Circuit. This case involved a handgun. The court discussed in detail the state of Kansas law concerning the type of tortious conduct that would give rise to a trier of fact being permitted to consider a punitive damage award. *Id.* at 1536.

If any doubt remained as to whether a succeeding purchaser of another's assets might be liable for failing to warn of a defect in a predecessor's product once the defect came to the successor's attention, such doubt was resolved under Kansas law by the 1984 decision in *Stratton v. Garvey Int'l, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290 (1984). This case will be discussed in more detail in Argument C, *infra*, but would any reasonable engineering manager have difficulty answering the question as to what his or her duty is with regard to warning about defects in his or her predecessor's product if the manager knows of the defective condition of the product and there is a relationship existing between the successor entity and the customers of the predecessor entity? The answer is clearly no under the analysis provided by the court in *Stratton, Id.* beginning at 258.

Petitioner persists in mischaracterizing the Kansas Supreme Court's decision in *Patton v. Hutchinson Wil-Rich Manufacturing Company*, 253 Kan. 741, 861 P.2d 1299 (1993) (*Patton I*) in an attempt to create the illusion there has been a retroactive application of a duty, which ultimately resulted in the imposition of punitive damages.

Judge Lungstrum rejected this precise argument when he addressed this point in his decision. (A-28-30)

This same argument was later presented to the Tenth Circuit. The Tenth Circuit began its analysis *de novo* (A-12) and utilized precedent from this court and established Kansas case law. The Circuit Court noted:

> "While *Patton I* does state that the certified questions presented issues of first impression, 861 P.2d at 1303, the questions involved the steps a manufacturer must take to locate its customers and whether Kansas recognized post-sale duties to retrofit or recall dangerous products. *Id.* at 1303-04. The opinion noted that there was "no statutory limitation nor . . . precedential authority" suggesting that Kansas would reject a manufacturer's post-sale duty to warn. *Id.* at 1311. When TIC decided to forego any warning program regarding defects in the Wil-Rich cultivator, it cannot state that its acts, based on the principles of Kansas common law, represented "no departure from any prescribed or known standard of care." *Danaher*, 238 U.S. at 490. (A-15-16)

It is inappropriate for Petitioner to persist in this specious argument. The Petition should be denied.

B.

Petitioner suggests the Tenth Circuit, and by implication the trial court, relied upon inapplicable precedent in arriving at an erroneous decision on the due process issue. The analysis employed by the Tenth Circuit, rejecting Petitioner's arguments with regard to *Southwest Forest Indus., Inc. v. Sutton*, 868 F.2d 352 (10th Cir. 1989) is hardly

subject to criticism since the Court acknowledged the cases addressed by Judge Lungstrum in *Patton v. TIC United Corp.*, 859 F. Supp. 509, 512 (D. Kan. 1994), (*Patton II*), and also found *Southwest Forest* instructive on how to determine whether Kansas common law duties were fairly indicated in the state's case law even though *Southwest Forest* was acknowledged to not address notice under the Due Process Clause. (A-15) The Tenth Circuit then utilized the very cases from this court the Petitioner is relying upon, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993) and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991), to conduct its evaluation under a two-part test to determine if the award of punitive damages against Petitioner offended due process. Petitioner's Due Process rights were not violated.

The decision of the Tenth Circuit was well reasoned and sound on this issue. The Petition should be denied.

C.

Petitioner's final argument regarding the correct interpretation that should be given to *Stratton v. Garvey Int'l, Inc.*, 9 Kan App. 2d 254, 676 P.2d 1290 (1984) is without merit. First, *Stratton* involved an analysis of whether an independent duty can exist for a successor corporation to warn about defects in a predecessor's product. *Stratton* involved a situation where liability was being sought to be imposed for the predecessor's liabilities, when under the traditional corporate law theory of liability, such liability would not exist. Second, Respondents never contended at trial Petitioner was a

"legal corporate successor" to the original manufacturer, Wil-Rich, Inc. Respondents always contended Petitioner was liable under the *Stratton* theory of liability since it was a successor entity that purchased the assets of the Wahpeton, North Dakota manufacturing facility (Wil-Rich Division), and assumed liabilities and debts related to those assets by its agreement with the transferor, because Petitioner did not have a sufficient nexus to make it a "legal successor" in order to enforce liability under *Comstock v. Great Lakes Distributing Co.*, 209 Kan. 306, 496 P.2d 1308 (1972). Nonetheless, Respondents successfully asserted and proved the "product line successor" theory at trial to the satisfaction of the judge and jury by meeting the burden of proof required by *Stratton*, 9 Kan. App. 2d at 258.

Petitioner ignores the specific holding of the Tenth Circuit, the abundant record contradicting its "abandonment" argument,[4] and the admissions of Petitioner's trial counsel acknowledging Respondents' assertion of liability under *Stratton*[5] when it contends Respondents abandoned the *Stratton* theory of liability prior to verdict. (*See* Petition at 16). The Tenth Circuit expressly found Petitioner waived its objections to the way the trial court addressed and presented *Stratton* issues in its rulings and

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[4] This record is summarized at pp. 10-13 of Appellees' Brief filed with the Tenth Circuit and the record evidence is contained in Aplee. Supp. App. at 1-4, 5, 17-18, 40-42, 95-98, 163-165, 423-462, 465-470, 476-478, 473-484, 493-501, 505-509, 551-552, 634, 694-704, Aplt. App. at 55-62 and TT 1236 and 1228. Also see f.n. 2 at p. 11 of Appellees' Brief.

[5] Aplee. Supp. App. at 496-500.

with the jury. (A-7, 8) No further comment on this point is deserved.

The argument made by Petitioner that there is a significant distinction between the duty imposed by *Stratton* and the duty imposed by *Patton I*, and, therefore, Petitioner should be relieved from the punitive damage award in this case is also misplaced. *Stratton* anticipates warnings may be required of a successor entity when it learns of defects in its predecessor's product. This discovery may not necessarily be as of the time of sale since in *Stratton* the successor entity did not manufacture or construct man-lift devices and "recently discovered" defects may result in the imposition of a duty to warn. *Stratton*, 9 Kan. App. 2d at 256, 258 (1984), *citing Gee v. Tenneco, Inc.*, 615 F.2d 857, 866 (9th Cir. 1980). *Stratton* contemplated and recognized a duty to warn after the point of sale.

It is almost unimaginable the Petitioner argues at this point in this case that its conduct cannot be the subject of punitive damage liability since all conduct must be evaluated as to what was known and foreseeable at the time the product was sold. The Supreme Court of Kansas in *Patton v. Hutchinson Wil-Rich Manufacturing Company*, 253 Kan. 741, 861 P.2d 1299 (1993), logically extended the general common law of Kansas, which had long required a manufacturer to exercise reasonable care, to a specific factual situation which had not previously been considered by the Kansas Supreme Court. The notions of reasonable care require one to act or refrain from acting when it is reasonable to do so under the circumstances. This is true under established case law regardless if it occurs before or after the sale of a product. The decision

to not take action can rise above mere actionable negligence to wanton or recklessly indifferent conduct when one is compelled to act for safety reasons once it is learned repetitive and similar injuries and deaths are occurring due to a latent hazard discovered in a product. Petitioner took not only an unreasonable but, indeed, an unacceptable risk with the lives and well being of its customers. This was done with total indifference to established rules of tort and punitive damage liability. The jury and reviewing courts have found this to be unacceptable conduct on the part of the Petitioner as should this Honorable Court. The Petitioner has failed to articulate any compelling reasons for granting certiorari and the Petition should be denied.

CONCLUSION

For the above and foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

DAVIS, UNREIN, HUMMER & BUCK, L.L.P.

GARY D. MCCALLISTER
BRENDA L. HEAD
Commerce Bank Building
100 S.E. 9th St., 3rd Floor
P. O. Box 3575
Topeka, Kansas 66601-3575
Telephone: (913) 354-1100

Counsel for Respondents